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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

NO. 17

BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, CUMMER CYPRESS COMPANY, *Appellants,*

VS.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION.

Brief for Appellants.

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April 9, 1930.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

NO. 494.

BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, CUMMER CYPRESS COMPANY, *Appellants,*

VS.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION.

Brief for Appellants.

REFERENCE TO THE OFFICIAL REPORTS OF THE OPINIONS OF THE DISTRICT COURT AND OF THE INTERSTATE COMMERCE COMMISSION.

The opinion of the District Court upon rehearing is dated March 22, 1929, and cited as *State of Florida v.*

United States, 31 F. (2d) 580. The opinion of that Court upon the original hearing is dated January 17, 1929, and cited as *State of Florida v. United States,* 30 F. (2d) 116. The report of the Interstate Commerce Commission is dated August 2, 1928, and is cited as *Georgia P. S. Commission v . A. C. L. R. R. Co.,* 146 I. C. C. 717.

STATEMENT AS TO JURISDICTION.

On December 20, 1929, appellants filed and served upon all opposing counsel their statement on the Jurisdiction of the Court, conformably to paragraph 1 of rule 12 of the Revised Rules of Practice of this Court. On January 27, 1930, the Court announced its finding that probable jurisdiction had been shown.

STATEMENT OF THE CASE

This is an appeal from a decree of the United States District Court for the Northern District of Georgia, Atlanta Division (R. 951), which, sitting as a specially constituted three-judge court in accordance with the provisions of the District Court Jurisdiction Act, 38 Stat. L. 219, denied the relief sought by appellants (as complainants in equity below), refused to enjoin an order of the Interstate Commerce Commission contended by appellants to be unlawful, and dismissed the bill and supplemental bill of complaint.

There was heard by the Court below jointly with Appellants' bills, two other bills and supplemental bills, also contending that the same order of the Interstate Commerce Commission was unlawful. The opinions of the District Court on original hearing (R. 44) and upon rehearing (R. 167) covered and disposed of

all three complaints in like manner, and similar individual decrees were entered by the District Court in all three proceedings (R. 170, 951, 1013). The complainants below in the two other cases are now before this Court with their individual appeals, being No. 493, *State of Florida;* and *A. S. Wells, E. S. Mathews, et al., Etc., Appellants, v. United States, Interstate Commerce Commission, et al., Appellees;* and No. 495 *Wilson Lumber Company of Florida, Appellant, v. United States of America, Interstate Commerce Commission, et al., Appellees.*

As a result of these final decrees of the District Court there was permitted to become effective an order of the Interstate Commerce Commission dated August 2, 1928 (R. 800) and subsequently amended in certain particulars (R. 165-to-167), which directed and required the Atlantic Coast Line Railroad Company to establish and maintain in effect certain rates for the transportation of logs over its lines of railroad "within and throughout the entire state of Florida, without exception."

The opinions of the District Court distinguish between what it recognizes as (1) undue prejudice to shippers or localities, or undue discrimination against *particular* interstate commerce (meaning apparently violations of Section 3 of the Interstate Commerce Act); and (2) discrimination against *general* interstate commerce, as when one state rate or the system of state rates is so low as to throw an undue burden on the revenues arising from interstate commerce (meaning apparently violations of Section 13). See 30 F. (2d) 116, at 120-121 (R. 46-47), and 31 F. (2d) 580, at 581 (R. 168). The view of the District Court seems to be that the order of the Commission cannot be justified on

the ground that it is necessary in order to remove a discrimination against *particular* interstate commerce, but can be justified on the ground that it is necessary to remove a discrimination against *general* interstate commerce.

The report of the Interstate Commerce Commission (R. 792), shows that the relief sought by the complainant there, with respect to interstate rates, was limited to a small section in north Florida, and the relief granted by the Commission with respect to interstate rates was likewise so limited. But the action of the Interstate Commerce Commission with respect to intrastate Florida rates was applicable "within and throughout the entire state of Florida, without exception."

The lawfulness of this order of the Interstate Commerce Commission, prescribing the future intrastate rates on logs "within and throughout the entire state of Florida, without exception," is the sole question raised before this Court. No action of the Interstate Commerce Commission with respect to any interstate rates, is here in issue.

The Proceedings Before the Interstate Commerce Commission.

The Georgia Public Service Commission, the regulatory Commission established by the State Legislature of Georgia, filed the original complaint with the Interstate Commerce Commission, naming the Atlantic Coast Line Railroad Company as defendant. The object of the complaint was stated in Paragraph 3 thereof to be as follows:

> "3. That the object of the complaint is to secure reasonable rates on logs from all points on the

> Atlantic Coast Line Railroad, as hereinafter shown within the state of Florida to all destinations on the said Atlantic Coast Line Railroad in the State of Georgia, and to have removed any unjust discrimination or undue prejudice found to exist as provided in the Interstate Commerce Act." (R. 193.)

The complaint alleged the existence of competition between mills and other consumers located within the State of Georgia and mills and purchasers located within the State of Florida "in the purchase and transportation of logs from Florida points." (Paragraph 4.) It set out the established mileage rates on logs, per carload, intrastate within Florida (Paragraph 5), and interstate from Florida to Georgia (Paragraph 6) for hauls up to 170 miles. It made comparison of certain specific applications of such Florida intrastate and such Florida to Georgia interstate rates for hauls up to 170 miles (Paragraph 7). It alleged that the interstate rates greatly exceeded the intrastate rates for like distances upon traffic moving under substantially similar transportation conditions (Paragraph 8).

Upon such allegations the complaint charged unlawfulness in the rates, thus:—

(1) That the interstate rates on logs from shipping points in Florida to destinations in Georgia were unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act; (2) that such rates unjustly and unlawfully discriminated against the Georgia log shippers, in violation of Section 2; that (paragraphs 9 and 10) such rate adjustment was unduly prejudicial and disadvantageous to Georgia interstate shippers and gave undue preference and advantage to intrastate Florida log shippers, in violation of Section 3. It was further charged in Paragraph 11:—

> "11. That the intrastate Florida rates charged and received by defendant carrier for the transportation of logs from Florida producing points to destinations in Florida give undue and unreasonable preference and advantage to intrastate shippers in Florida; and are unduly prejudicial and disadvantageous to the interstate shipper in Georgia, and causes undue and unreasonable and unjust discrimination against interstate commerce in the violation of Section 13 of the Interstate Commerce Act."

The defendant carrier before the Commission, the Atlantic Coast Line Railroad Company answered with an admission that

> "Its rates applicable on logs * * * interstate * * * from Florida points to destinations in Georgia, are in excess of the intrastate rates in Florida where hauls are for distances of 170 miles and under;"

and the denial that its interstate rates are either unjust or unreasonable, and also with the denial that there was any violation of the Interstate Commerce Act. The Answer prayed for the dismissal of the complaint. (R. 199.)

A large number of interveners appeared as parties interested at the hearing before the Commission. These included railroads other than defendant Atlantic Coast Line, operating in Florida, presumably to defend the interstate rates under attack; the Florida Railroad Commission and numerous intrastate log shippers in Florida; and two Georgia lumber companies which presumably supported the complaint. (R. 399.)

At the opening of the hearing the presiding Exam-

iner made a statement of the issues in the proceeding as follows (R. 401):—

> "It is alleged that the rates on logs, in carloads, from points in Florida to destinations in Georgia are unreasonable, unjustly discriminatory, unduly preferential of Florida shippers, and the Florida intrastate traffic, and unduly prejudicial to Georgia Shippers and to interstate traffic, in violation of Sections 1, 2, 3 and 13 of the Interstate Commerce Act. The Commission is asked to prescribe reasonable rates for the future."

No corrections or changes were suggested by any party to such statement of the issues. (R. 401.)

Neither in the formal pleadings nor in the statement of the issues by the Examiner was there any suggestion as to how the "object" of the complaint of the Georgia Public Service Commission was to be accomplished,—whether by reduction of the interstate rates from Florida to Georgia to equalize the Florida intrastate rates, or by increase of the Florida intrastate rates to equalize the interstate rates, or by a general levelling of both down and up.

The Georgia Public Service Commission put on its case with one witness, who presented a series of comparisons of the interstate and state rates for hauls up to 170 miles (R. 401, *et seq.*), which evidence is commented upon by the Commission in its report at page 721 (R. 795). There was no evidence of any movement of logs interstate from Florida to Georgia; the witness admitted no extensive movement was likely because of the rates, and the Commission so found (R. 796). There was no evidence offered by this witness demonstrating similarity of circumstances and conditions surrounding the transportation of logs, interstate and

state; he had no knowledge of the subject. (R. 705-706.)

This witness for the Complainant made it clear that the object of the complaint was to extend the Florida intrastate rates scale and make it applicable to the movement of logs interstate from Florida to Georgia. He said (R. 417):—

> "I have not prepared any schedule of rates to suggest being used as a means to remove the discrimination against Georgia manufacturers, as shown in our exhibit, but do suggest and contend that the rates *now* being operated in Florida be extended into Georgia for interstate application." (Italics ours.)

Concluding his statement to the Commission on direct this witness further said (R. 417-418):—

> "While this is not a revenue case, it is possible that the Commission will give some consideration to the possible effect on the Atlantic Coast Line revenues if these discriminations are removed by requiring the Florida scale to be extended into Georgia, and if so we would like to call attention to the impossibility of any extensive movement at the present time from Florida to Georgia on the present high interstate rates, and, therefore, it follows that if the Georgia manufacturer is given the benefit of these Florida rates, the same as his Florida competitor, it will very materially increase the movement from Florida into Georgia and thus have the effect of creating new and increased revenues for the Atlantic Coast Line, rather than to decrease their revenues."

The same witness voiced the same aim of the Georgia Public Service Commission a third time on cross-examination (R. 419).

The Chairman of the Georgia Public Service Commission (Perry), acting as its counsel at this same hearing, confirmed the position of his Commission as stated by his witness, saying with respect to the proposal that the Florida intrastate rate be extended into Georgia (R. 421), "* * * that is all there is in the case, it is all that has ever been in the case, it is all we are asking for and all we hope to gain." And again, toward the close of the hearing, Chairman Perry stated that the Georgia Public Service Commission's reason for bringing the complaint was "as fully outlined in the testimony of its rate expert, Mr. E. M. Price." (R. 655.)

There also appeared five witnesses representing interveners supporting the complaint. These likewise took the position that relief should be afforded under the complaint by reducing the interstate rates from Florida to Georgia. (J. C. Jackson, R. 422; Simmons, R. 426; Giddens, R. 532; Davies, R. 544; H. A. Jackson, R. 553.) One of these five also took the position on the strength of calculations made for him by the defendant Atlantic Coast Line, that he could do business in Georgia if the Florida intrastate rate to Jacksonville were increased (Davies, R. 545).

From the foregoing it appears that the complainant filed its case, and, with those supporting it as interveners, prosecuted it before the Commission, upon the theory that relief should be afforded by the Commission by an order requiring the reduction of the interstate rates to the level of the then effective intrastate rates in Florida. And neither the complainant nor the defendant or any other party before the Interstate Commerce Commission offered any evidence designed to prove or tending to prove that the Florida intrastate

rate on logs resulted in a revenue burden upon interstate commerce. It was in no sense "a revenue case" (R. 417).

At the conclusion of the testimony on behalf of the complainant and its supporting interveners the various Florida interveners filed a written motion challenging both the power of the Commission in the premises and the sufficiency of the evidence. This was referred by the Examiner to the Commission (R. 467, side R. 211). At the conclusion of defendants' testimony the motion was renewed, with the express announcement on behalf of the Florida interveners that, "We are going to go ahead and 'put' in evidence-in-chief, without having our motion or any rights that we have previously acquired thereunder". (R. 562.) The motion again was made to Division 4, and was not denied until the Report of that Division on the merits of the case was finally made. (R. 792.)

The Report was by Division 4 of the Commission (R. 790), and resulted in very minor reductions in the interstate rates on logs, Florida to Georgia, and very material increases in the intrastate rates within the State of Florida. (R. 795, 800-801)

The pertinent part of the order of Division 4 of the Commission which accompanied its report dated August 2, 1928, is the fourth paragraph thereof. This, upon issue, read as follows (R. 800-801):—

> "*It is further ordered,* that said defendant be, and it is hereby, notified and required to cease and desist from practicing the undue preference and advantage, undue prejudice, and unjust discrimination found in said report to exist in the relation of intrastate and interstate rates and to establish, put in force, and maintain rates for the transportation of logs, except walnut, cherry and cedar

> in carloads, minimum weight 40,000 pounds, in intrastate commerce within the State of Florida which shall be the same as those prescribed in the next preceding paragraph hereof as reasonable for transportation in interstate commerce from points in the State of Florida to destinations in the State of Georgia."

Petitions for re-argument and reconsideration by the entire Commission, were filed by the various Florida interveners (R. 818, 841, 865), and were denied (R. 870).

Between August 2, 1928, and the date when it finally became effective the said paragraph four was twice amended by the Commission, on February 5, 1929 (R. 166), and February 7, 1929 (R. 166). In final form, and as it eventually became effective, paragraph four required that the mileage scale of rates prescribed for interstate application from Florida to Georgia (R. 800-801, and 166-167) should also be made effective,

> "for the transportation of logs * * * in intrastate commerce within and throughout the entire state of Florida, without exception."

The Proceedings in the District Court.

Appellant's original bill of complaint was filed in the District Court on Nov. 24, 1928 (R. 870). At or about the same time there were two substantially similar bills filed by the State of Florida and the Wilson Lumber Company of Florida, the other Appellants now before this Court in Nos. 493 and 495, (R. 1, 960). All three bills attacked the validity of the same report and order of the Interstate Commerce Commission—that cited as *Georgia P. S. Commission vs. A. C. L. R. R. Co.*, 146 I. C. C. 717 (R. 790). The named and in-

tervening defendants before the District Court all denied the complainants' material allegations of unlawfulness in the action of the Commission (R. 887, 889, 898). The three proceedings were consolidated and heard jointly (R. 43), the issues raised being summarized by the Court below thus (R. 44):—

> "The contentions of invalidity make these main questions: (1) Is the order within the lawful powers of the Commission? (2) Is it within the issues sought to be investigated and made after full hearing of them? (3) Is it arbitrary because unsupported by sufficient evidence? (4) The State of Florida and Wilson Lumber Company, construing the order as abrogating the Coast Line's intrastate log rates throughout the state of Florida rather than within the limited territory for which new interstate rates were fixed, make the special and newly raised contention of an entire want of evidence to support so broad an order." (First Decision, page 118)

At that time the order of the Commission under attack prescribed rates for application upon the transportation of logs "in intrastate commerce within the State of Florida." (R. 800-801.) The case really went off on the Court's construction of this language, as shown in subdivisions (7) and (8) of the first opinion below. The Court said (R. 50):—

> "From a cursory search of the record it appears to be true that the evidence, though often broadly phrased, really related to the logs in North Florida, a territory described by the Commission in its order establishing new intrastate (*sic*,—official report of decision reads "interstate") rates as north of and including Jacksonville, Gainesville,

Burnett's Lake and High Springs." No interest, apparently, was taken by any one in the territory more remote from the Georgia line, evidently because the class of logs involved, could under no circumstances, be profitably moved so great a distance. Although the complaint covered the whole of Florida, the real contention, and the Commission's own action upon the interstate rates, were limited to that northern territory, and the evidence related only to it." (page 50) * * *

"The language of the order passed touching the intrastate rates can be construed as fixing rates for the whole state." (page 50) * * *

"The respondents in answering the bill of the state of Florida seem to deny this construction. The answers to the bill of the Wilson Lumber Company vary. Those of the Interstate Commerce Commission and Georgia Public Service Commission do not commit themselves to any construction, but leave the order to speak for itself. We think it can also be construed as limited to points of origin on the Coast Line Railroad north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs." (page 50.)

"The Commission confined its order on interstate rates expressly to these origins, and dealt with the intrastate rates only by reference to the order fixing the interstate rates, declaring that the rates 'in intrastate commerce within the state of Florida shall be the same as those prescribed in the next preceding paragraph hereof as reasonable for transportation in interstate commerce from points in the State of Florida to destinations in the State of Georgia:" (page 51). * * *

"Since the first construction would probably nullify the order, we think we should follow the established rules in construing contracts and statutes, holding to the latter construction which would uphold it." (page 51)

And, pursuant to these conclusions, the Court below construed the order as not state-wide, found no sufficient cause to enjoin and set it aside, and entered its decree dismissing all the three bills of complaint (R. 51, 52, 901, 984).

The order of the Commission so construed by the District Court was then scheduled to become effective February 8, 1929. The carrier respondent thereto, the Atlantic Coast Line, proceeded to comply therewith in disregard of the interpretation of the order by the District Court, by increasing the rates on logs statewide throughout Florida. This gave rise to further court proceedings, in both the state and federal courts in Florida, and as set forth in the supplemental bills of complaint subsequently filed in the Court below (R. 61, 912, 987). While these further proceedings were under way the Interstate Commerce Commission amended its order theretofore construed by the District Court as above set forth, to make the requirement as to intrastate rates on logs over the Atlantic Coast Line apply "within and throughout the entire state of Florida, without exception." (R. 166.) This of course nullified the interpretation theretofore made by the District Court of the order in its original form.

Promptly after this last amendment of its order by the Commission the Appellants, as complainants below, filed in the District Court their petition for rehearing of the entire matter, and their Supplemental Bill of Complaint (R. 902, 912). The two other original complainants below filed similar petitions and Supplemental Bills in their individual cases (R. 52 and 61, 985 and 987). A rehearing was granted, and the Atlantic Coast Line, the carrier defendant before the Commission, then for the first time appeared in the

District Court, and was allowed to intervene in support of the Commission's order (R. 934, 935). The Court's reconsideration of the matter was had in the view that (R. 167):—

> "The ambiguity which we formerly found in the order of the Commission is now removed, and the intent made clear that the intrastate log rate in question is to be changed over the entire Coast Line system in Florida." * * *
>
> "We have therefore to examine the record more closely, and see if a state-wide change of the rate is sustainable." (p. 167)

In the final opinion below the District Court first concluded that a state-wide order altering the intrastate rate could not, on the evidence, be justified "because of undue prejudice to shippers and localities, or because of undue discrimination against the *particular* interstate commerce in such logs." (R. 168) But it then proceeded to recognize (R. 168) that:—

> "There is, however, another discrimination against *general* interstate commerce, when one state rate or the system of state rates is so low as to throw an undue burden on the revenues arising from interstate commerce, in order to sustain the carrier engaged in both kinds of commerce,"

and to hold, further, (R. 168) that:—

> "The natural remedy for such a condition is a change of the state rate or rates to the full extent of their application."

The Court then concluded:—

> "The rate (*i. e.*, the intrastate rate) was therefore in issue for all purposes of section 13, al-

though there was no express prayer for its enhancement, and no express allegation that it was unprofitable to the carrier." (R. 168)

"We cannot say the order is without evidence to sustain it, on the ground that the former state rate was an undue discrimination against general interstate commerce over the Coast Line Railroads." (R. 169.)

"We find no reason to doubt that, however disappointing the result, the hearing was full, within the meaning of the statute, and the power of the Interstate Commerce Commission not abused." (R. 170.)

Accordingly decrees were entered denying the relief sought and dismissing the bills and the supplemental bills of complaint in all three cases. (R. 170, 951, 1013.)

It is from these decrees that this appeal and the two associated appeals are prosecuted.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

These Appellants filed in the District Court twenty-seven assignments of error, all of which are intended to be urged. They are that the District Court erred as follows (R. 953):—

I. In denying the relief prayed, and in dismissing the bill and supplemental bill.

II. In failing and refusing to find that the report and order of the Interstate Commerce Commission of August 2, 1928, as amended February 7, 1929, constitute an unlawful exercise of power by said Commission and are without warrant or authority of or under the Constitution of the United States.

III. In failing and refusing to find that there is not and cannot be any interstate commerce in logs over the Atlantic Coast Line Railroad from Florida origins to Georgia destinations on its line.

IV. In failing and refusing to find that the compulsory increase of the Florida intrastate rates on logs of the Atlantic Coast Line Railroad Company could not and did not result in the creation of interstate commerce in logs over the Atlantic Coast Line Railroad Company from Florida to Georgia.

V. In failing and refusing to find that there was no substantial evidence of record before the Interstate Commerce Commission showing or tending to show that substantially similar circumstances and conditions surrounded the transportation of logs by railroad on the one hand over the Atlantic Coast Line Railroad Company between points in Florida and on the other hand from origins on its line in Florida to destinations in Georgia.

VI. In failing and refusing to find that there was no issue or controversy under the issues as restricted and defined at the hearing before the Interstate Commerce Commission as to the question that the lower level of the Florida intrastate log rates of the Atlantic Coast Line Railroad Company caused or would cause unjust discrimination against interstate commerce as such in violation of Section 13 of the interstate commerce act.

VII. In failing and refusing to find that the report and order of the Interstate Commerce Commission as amended are unlawful because said Commission has thereby sought to embrace within the scope thereof all rates of the Atlantic Coast Line Railroad Company on logs between any stations on its line wholly within the State of Florida

for any length of haul, not exceeding 170 miles, and in any portion of such State, although there was no case or controversy submitted to that tribunal or pending before it involving in any way freight rates of the Atlantic Coast Line Railroad Company on logs within Florida, except for hauls of 170 miles and less over such railroad wholly within the so-called Northern portion of the State of Florida.

VIII. In failing and refusing to find that the said order as amended is invalid because of its territorial scope, in that said order as amended fixes the intrastate rates on logs between all points on all the lines of the Atlantic Coast Line Railroad Company in Florida, whereas the intrastate rate investigation in said proceedings before the Interterstate Commerce Commission was limited to movements of logs between points on only a portion of the lines of said Atlantic Coast Line Railroad Company located in only a small area situated in Northern Florida.

IX. In failing and refusing to find that there was no evidence whatsoever before the Interstate Commerce Commission supporting or tending to support the conclusion that the continued maintenance of the Florida intrastate log rates of the Atlantic Coast Line Railroad Company would subject interstate commerce to unjust discrimination in violation of Section 13 of the interstate commerce act.

X. In failing and refusing to find that the report and order of the Interstate Commerce Commission are unlawful because they seek to interfere with the voluntary continuance of the Florida intrastate rates on logs over its line by the Atlantic Coast Line Railroad Company without any substantial evidence showing or tending to show that

the continuance of such Florida intrastate log rates in any way violates the provisions of Sections 3 or 13 of the interstate commerce act, and without any request or petition by said Atlantic Coast Line Railroad Company, by the Georgia Public Service Commission, or by any other party to either the Interstate Commerce Commission or to the Florida Railroad Commission to increase such Florida intrastate log rates, and without any other effort whatsoever by said Atlantic Coast Line Railroad Company to increase said rate.

XI. In failing and refusing to find that the report and order of the Interstate Commerce Commission are unlawful because there was no substantial evidence to support the finding that such Florida intrastate log rates are less than reasonably compensatory.

XII. In failing and refusing to find that the report and order of the Interstate Commerce Commission are unlawful because the facts of record before the Commission do not show that there is or would be any real or substantial injury to or restriction upon interstate commerce as a consequence of the continued maintenance of the Florida intrastate log rates of the Atlantic Coast Line Railroad Company.

XIII. In failing and refusing to find that the report and order of the Interstate Commerce Commission constitute an unlawful invasion of the sovereign rights of the State of Florida reserved to it under the Constitution of the United States and the citizens of the State of Florida and is without any warrant or authority of or under the Constitution of the United States, and further, that said Interstate Commeree Commission was and is without jurisdiction to enter said report and order.

XIV. In failing and refusing to find that the issue as to whether the lower level of the Florida intrastate log rates of the Atlantic Coast Line Railroad Company cause or would cause unjust discrimination against interstate commerce in violation of Section 13 when construed with Section 15a of the Interstate Commerce Act, was eliminated from the proceeding before the Commission by the parties thereto.

XV. In failing and refusing to find that the intrastate rates, investigated by the Interstate Commerce Commission, were not those contemplated by Section 13 (4) of the Interstate Commerce Act, as amended, because same were voluntarily initiated by the carrier, and therefore not "made or imposed by authority of any State", within the description of Section 13 (3) of said Act.

XVI. In failing and refusing to find that the report and order of the Interstate Commerce Commission as amended are unlawful because there were no facts of record in such proceeding before the Interstate Commerce Commission showing, or tending to show, nor did the Interstate Commerce Commission find any facts sufficient to constitute, unjust discrimination against interstate commerce in violation of the provisions of Section 13 of the Interstate Commerce Act.

XVII. In holding that the order of the Interstate Commerce Commission of August 2, 1928, as amended on February 7, 1929, was within the issues sought to be investigated by said Commission.

XVIII. In holding that said order of the Interstate Commerce Commission was made after a full hearing by said Commission.

XIX. In holding that the report and order of the Interstate Commerce Commission raising the

state rate of the Atlantic Coast Line Railroad Company over its entire system in Florida on logs is justified in order to remove discrimination against *general* interstate commerce in that said Florida intrastate log rates are so low as to throw an undue burden on the revenues arising from interstate commerce.

XX. In the holding that "there was no territorial limitation in the complaint. No such limitation was put on the inquiry by any subsequent amendment or by any order of the Commission. * * * The rate was therefore in issue for all the purposes of Section 13, although there was no express prayer for its enhancement, and no express allegation that it was unprofitable to the carrier."

XXI. In holding that "in rejecting the conclusion of slight net income asserted by the witnesses, the Commission did not rule out the basic facts shown, but was at liberty to supplement them and construe them for itself, and make its own conclusion from them."

XXII. In holding that the Interstate Commerce Commission, in reaching its conclusions respecting the Florida intrastate rates on logs, was entitled to rely upon "the common knowledge and skill in rate matters that the Interstate Commerce Commission, the Georgia and Florida State Commissions, and the railroads must have in such matters."

XXIII. In holding that "on the face of things the log rate is too low, and likely to burden the carrier."

XXIV. In holding that "we cannot say that the order is without evidence to sustain it, on the ground that the former state rate was an undue

discrimination against general interstate commerce over the Coast Line Railroads."

XXV. In holding that the complainants in their reply to the exceptions of said Georgia Public Service Commission to the report of the examiner of the Interstate Commerce Commission failed to contend that the finding of said report with respect to the burdensomeness of said rate was foreign to said investigation.

XXVI. In holding that the complainants in their application for a rehearing before the entire Interstate Commerce Commission failed to contend that the burdensomeness of the Florida intrastate rate was foreign to the investigation had by said Interstate Commerce Commission.

XXVII. In failing to suspend, annul and permanently enjoin the Commission's order of August 2, 1928, as amended from time to time in order to extend the effective date thereof, and as changed in language for the purpose of clarification on February 7, 1929, insofar as said order applied to rates on the intrastate transportation of logs in Florida.

ARGUMENT.

Summary.

The order of the Interstate Commerce Commission was beyond the scope of the issues raised in the proceeding before the Commission wherein said order was entered; it was made without any substantial evidence to support it; and was made without the full hearing required as precedent to the entry of such order by the interstate commerce act.

The order of the Interstate Commerce Commission was beyond the scope of its statutory power.

The Interstate Commerce Commission, in condemning existing rates and in fixing rates for the future, is not authorized or empowered to "supplement" the facts shown of record before it, or to rely upon "the common knowledge and skill in rate matters that the Interstate Commerce Commission, the Georgia and Florida State Commissions, and the railroads must have in such matters," and the District Court erred in the view that the Commission could so supplement the facts of record and could rely upon such common knowledge and skill.

The Interstate Commerce Commission was without power to regulate and fix the intrastate rates for the transportation of logs wholly within the State of Florida because said rates were voluntarily initiated and maintained in effect by the carrier and were not rates "made or imposed by authority of any state" within the description of Section 13 (3) and (4) of the interstate commerce act.

The order of the Interstate Commerce Commission constituted an act in contravention of the Constitution of the United States.

The District Court, in order to uphold the jurisdiction and order of the Interstate Commerce Commission, relied upon the Court's own conclusion upon the evidence with respect to the propriety of the rates in controversy and in so doing exercised administrative power not possessed by the Court.

The District Court should have granted the relief prayed for in the Bill and in the Supplemental Bill, and should have permanently enjoined the order of the Interstate Commerce Commission.

Statutes Relied Upon.

The relevant portions of the statutes relied upon are printed in the Appendix to this brief.

Point I.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION WAS BEYOND THE SCOPE OF THE ISSUES RAISED IN THE PROCEEDING BEFORE IT WHEREIN SAID ORDER WAS ENTERED.

(This is applicable to Assignments of Error VI., VII., VIII., X., XIV., XVII., and XX.)

The proceeding before the Interstate Commerce Commission wherein was entered the order here in question was distinctly of the "Complaint and Answer" variety authorized to be filed by Section 13 (1) of the Interstate Commerce Act, and with respect to which the Interstate Commerce Commission is empowered to grant future relief under Sections 15 (1) and 13 (4). The proceeding was most emphatically not a general investigation on the Commission's own motion with issues such as the Commission might have chosen to make them as authorized by Section 13 (2).

The Georgia Public Service Commission as complainant before the Interstate Commerce Commission directed its attack fundamentally against the interstate rates applicable to the transportation of logs from Florida origins to Georgia destinations for hauls as long as up to and including 170 miles. Those

rates, it was shown, were higher than the rates for like hauls of logs intrastate in northern Florida. It was charged that the interstate rates were unreasonably high and that the *relation* of the interstate and the lower Florida intrastate rates gave rise to unjust discrimination, to undue prejudice and preference, and to unjust discrimination against interstate commerce. The prayer of the complaint asked for just, reasonable, non-discriminatory and non-prejudicial interstate rates for the transportation of logs from Florida to Georgia and—

> "* * * that the measure of said rates be no higher than the rates concurrently in effect for the same kind of property, from producing points located within the State of Florida, moving in intrastate commerce, to destinations within the State of Florida." (R. 197.)

There was but one carrier named as defendant in this complaint,—the Atlantic Coast Line Railroad Company. This defendant, while admitting that its interstate rates on logs from Florida to Georgia exceeded the intrastate rates within Florida, for hauls up to 170 miles, denied that those interstate rates were unjust and unreasonable. Beyond that it denied any violation whatever on its part, of the interstate commerce act, and prayed for the dismissal of the complaint of the Georgia Public Service Commission. (R. 199.)

The issues presented for the Commission's determination were those joined by this complaint and answer, and no other. It is to be observed that the Georgia Public Service Commission, far from attacking the intrastate Florida rates, specifically relied upon

the same as the measure of the relief which it hoped to obtain by way of reduction in the rates from Florida to Georgia. It is further to be observed that the Atlantic Coast Line not only specifically denied any unlawfulness on its part in the maintenance of these various rates but prayed also for the dismissal of the complaint. It is quite impossible under such circumstances to deduce that the pleadings in any respect brought in issue the reasonableness of the intrastate rates within Florida. On the contrary those very rates were accepted by the complainant as proper and offered by it as the test of what the interstate rates should be for the future; they were defended by the Atlantic Coast Line which published and maintained them.

It may be said that the prayer of the complainant did not specifically ask for the prescription of interstate rates no higher than the rates *then* effective intrastate within Florida. Any doubts with respect to this point, however, were speedily removed by the representatives of the complainant upon hearing. The only witness offered by the complainant (Mr. E. M. Price, Rate Expert of the Georgia Commission), when asked if he had prepared a schedule of rates to be used as a means of removing the discrimination complained of, answered (R. 417)

> "I have not prepared any schedule of rates to suggest being used as a means to remove the discrimination against Georgia manufacturers, as shown in our exhibit, but do suggest and contend that the rates *now* being operated in Florida be extended into Georgia for interstate application." (Italics ours.)

Again, this same witness said (R. 419):—

> "I do not think that the interstate rates from Florida into Georgia should be higher than the intrastate rates between points in Florida."

Counsel for the Georgia Public Service Commission, Mr. Chairman Perry, speaking to (R. 420) "the extension of the Florida rates under review here, being extended into Georgia," stated:—

> "That is all there is in the case, it is all that has ever been in the case, it is all we are asking for, and all we hope to gain." (R. 421.)

This was said at the close of the testimony of the only witness offered on behalf of the complainant, and after it had for the first time concluded its case (R. 419). Finally, and with reference to the testimony offered on behalf of the Florida Commission, Chairman Perry stated further, with respect to the testimony theretofore given by his witness Price (R. 417, 419):—

> "In view of the statement made by Chairman Wells of the Florida Commission on yesterday, I simply desire to direct attention to the reason of the Georgia Public Service Commission for bringing this application, as fully outlined in the testimony of its rate expert, Mr. E. M. Price. (R. 655.)

Appellants respectfully submit that while the complaint before the Commission did contend that an unjust discrimination against interstate commerce existed by reason of the relation of the interstate rates and the lower intrastate Florida rates, that contention was based throughout on the theory that the only

rates which were unlawful *per se* were the interstate rates. The defendant, the appellants further submit, took substantially the same position, contending that there was nothing unlawful in the intrastate rates *per se*, and contending also that there was nothing unlawful in the interstate rates.

Point II.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION WAS MADE WITHOUT ANY SUBSTANTIAL EVIDENCE TO SUPPORT IT.

(This is applicable to Assignments of Error III., IV., V., IX., XI., XII., XVI., XXI., XXII., and XXIV.)

It is elementary that an administrative order of the Interstate Commerce Commission fixing rates for the future, unless supported by substantial evidence of record before the Commission, must fall. But the order of the Interstate Commerce Commission in issue here, it is to be noted, was something more than a mere administrative order. It fixed *intrastate* rates on logs for future application "within and throughout the entire State of Florida, without exception,"—and Florida is a big state. Swing a map of Florida on its northwestern corner as a center, and the resulting circle will embrace practically all of southeastern United States and reach to Indianapolis, Indiana.

At the outset, therefore, your appellants desire to point out that substantial evidence alone (even if it could be found in the record before the Commission, —which we deny), would not be sufficient to justify the broad scope of the order in question. For that order not merely fixes future rates,—it enters the domain of a sovereign state and there proceeds to exercise a

power which is inherently a power of the state, and a power which was never conferred upon the federal government. This is recognized by the Congress in that provision of Section 1 of the Interstate Commerce Act which excepts from the scheme of Federal regulation there set up such commerce as is "wholly within one State and not shipped to or from a foreign country from or to any place in the United States." It is recognized also, we think by this Court in the *Shreveport case*, 234 U. S. 342, 358, and in the *Wisconsin case*, 257 U. S. 563, 588.

With no provision in the Constitution whereby the Congress can invade the domain of the State and proceed to regulate the purely intrastate commerce as such, it of course follows that no such power could have been granted by the Congress to the Interstate Commerce Commission, and logically, we think, the Commission cannot justify any exercise of such power merely because "substantial" evidence, sufficient to justify an ordinary exercise of purely administrative action with respect to interstate commerce, was before it (which, of course, we again deny).

Moreover, your appellants believe that law as well as logic supports this conclusion. Not the fixing of an interstate rate at all, but solely the regulation of purely intrastate commerce, is what is here involved. Of such action this Court has said in the *Illinois C. R. Co. v. Public Utilities Com.*, 245 U. S. 493, 510:—

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly

> manifested. (Citing cases.) This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty."

This language in substance approved what had been previously said in the *South Dakota case,* 244 U. S. 617, 625, and was quoted with approval by this Court in the *Wisconsin case* (p. 580).

The "subordinate agency", we insist, does not meet these requirements of "clear manifestation" and "high standard of certainty" by reliance upon what it might deem "substantial" evidence, even though such evidence might exist, which we again deny. The "reserved powers of a state" should not be set at naught by the Federal government,—surely not by any subordinate agency thereof,—except when the *great preponderance of lawful evidence* demands such extraordinary action. The rights of the state are certainly no less sacred than those of the individual.

Precisely this, and nothing less, your appellants respectfully submit, is found in the concurring opinion in *Eastern Texas R. Co. v. Railroad Commission of Texas,* 242 Fed. 300, 307-308, where Circuit Judge Batts said:—

> "But the authority of the Interstate Commerce Commission with reference to intrastate rates is purely incidental and remedial. The qualities of such an order are radically different from those of an order resulting from the exercise of the legislative function involved in rate-making. To hold that it may, under any circumstances, regulate a state rate, is to carry the rules of interpretation to the extreme limit, in view of the proviso in the

first section of the Interstate Commerce Commission Act (Act. Feb. 4, 1887, c. 104, 24 Stat. 379 (Comp. St. 1916, Sec. 8563)). It may be held that it has the power to make such orders affecting intrastate rates as are necessary to prevent discrimination; certainly, the authority will not go beyond the necessary. When the Interstate Commerce Commission acts with reference to such a matter, it makes, or should make, the same character of investigation and the same character of determination that would be made by a court if a carrier charging the intrastate and the interstate rates were prosecuted for a violation of the Interstate Commerce Commission Act. Its action would be more nearly judicial than legislative. Whenever such an order is under consideration by a court, the court would have to determine whether the jurisdiction of the Interstate Commerce Commission had been exceeded; and it would doubtless decline to apply the same rules with reference to the conclusiveness of the action of the Interstate Commerce Commission that obtain when that body is, in the exercise of its established legislative authority, making rates. It would not permit the Interstate Commerce Commission to conclusively determine its jurisdiction by determining the fact of the discrimination upon which its jurisdiction would depend."

There was not before the Interstate Commerce Commission in this proceeding, we respectfully submit, evidence which "persuasively showed," and indicated to "a high degree of certainty," or which "clearly manifested" that the Federal subordinate agency should regulate and raise the rates on logs "within and throughout the entire State of Florida, without exception," and for all time.

(a).—*Such evidence as was offered to the Commission to prove undue prejudice and preference as between particular persons, places and commodities was not state-wide in character and effect.*

There was evidence presented to the Commission for the purpose of demonstrating undue prejudice and preference as between interstate and intrastate commerce with reference to particular persons, places and commodities, but this evidence was, we think, recognized by the Commission to be not state-wide in character and effect. This is shown by the following excerpt from the report of the Commission (R. 792):

> "While complainant assails the rates from all points on defendant's lines in Florida to all points on its lines in Georgia, the record shows that in so far as the interstate rates are concerned relief is desired only with respect to rates on logs, except walnut, cherry, and cedar, from that portion of Florida lying north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, hereinafter referred to as north Florida, to destinations in Georgia for distances not exceeding 170 miles."

So much for the case of the complainant before the Commission. The defendant, the Atlantic Coast Line Railroad Company, had, as already shown under Point I., denied unlawfulness in the rates brought in issue, and had asked the dismissal of the complaint. More specifically, the defendant's traffic witness before the Commission, Mr. Perrin, stated that the purpose of his evidence was:

> "To establish the reasonableness of the existing interstate charges on logs from stations on our

> line in Florida to destinations on our line in the State of Georgia, that is, from north Florida." (R. 515.)

Furthermore, Mr. Perrin also testified that he was making no proposal to the Interstate Commerce Commission with respect to the intrastate rates in Florida. He testified (R. 495):

> "Q. Now as to your proposal, Mr. Perrin, to remove this discrimination complaint brought by the Georgia Commission by the use of the present Alabama scale, and which you propose to apply interstate between Alabama and Georgia, and I believe South Carolina and Georgia, was it your purpose to convey to the Commission that that scale should also be used in Florida?
>
> "A. Why, I made no proposition as to that, Mr. Price, as to the intrastate rates in Florida, I made no proposition as to that."

On this point, moreover, there was no doubt whatever in the minds of the Judges of the Court below, in their decision upon rehearing (R. 168). They found:

> "No such case is, therefore, shown by the evidence as to justify a state-wide order altering the intrastate rate, because of undue prejudice to shippers and localities, or because of undue discrimination against the *particular* interstate commerce in such logs."

No exception was taken by the United States or by any other defendant below to this finding of the District Court and there is no appeal therefrom to this Court.

Accordingly, appellants say that the evidence presented to the Commission designed to show undue prejudice and preference as between particular persons,

places, and commodities in interstate and intrastate commerce was not state-wide in character and effect, was insufficient to support a "state-wide, without exception" order, and that this is judicially settled.

(b).—*A mere difference in rate levels, interstate as compared with intrastate, is not sufficient to justify an order increasing the intrastate rates within and throughout the entire state.*

The Commission found, and these appellants do not deny, that the Florida intrastate rates on logs were lower than the interstate rates on logs from north Florida to Georgia for the same lengths of haul.

But there is nothing inherently unlawful in different rates for state as compared with interstate transportation. So long ago as *Smyth v. Ames*, 169 U. S. 466, 540, that was recognized by this Court. There the Court said:

> "The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one state. * * * (But they are not necessarily bound to give absolutely the same rates to the people of all the states), for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both states might result in one great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states, are of little value, unless all of the elements that enter into the problem are presented."

Relying upon this case (and others might be cited to the same effect—see *Northern P. R. Co. v. North Dakota ex rel. McCue,* 236 U. S. 585, and cases there cited), appellants respectfully submit that the mere difference in the rate levels cannot be held justification for this extraordinary invasion of states' rights.

Peculiarly enough, the Commission itself recognized these limitations upon its power in dealing with another question of undue prejudice and preference and unjust discrimination against interstate commerce as between other Florida intrastate rates and interstate rates. We refer in this respect to *Rates on Fertilizer Materials within State of Florida,* 151 I. C. C. 602.

The Commission's report in this *Florida Fertilizer case* was issued, it will be noted, only 21 days after the date on which that body finally amended its order in the log case to make doubly certain that the rates which it had there prescribed would be effective "within and throughout the entire state of Florida, without exception." In the *Florida Fertilizer case,* as in the log case, the intrastate rates were lower than the interstate rates for similar hauls, except in the case of hauls under 20 miles. But despite that fact, which the Commission found to exist, at page 608 of its report, the Commission said:

> "With respect to discrimination against interstate commerce generally, it is not shown that the loss of revenue occasioned by the intrastate rates on materials is of sufficient amount to create a substantial burden on such commerce. In *Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co.,* 257 U. S. 563, 590, the Supreme Court said:
>
> "Action of the Interstate Commerce Commission in this regard should be directed to sub-

> stantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce. * * *'" (pp. 608-609.)

Beyond this the Commission said (p. 609):

> "Furthermore, it is not certain that if the Florida intrastate rates were increased to the interstate level, additional revenue would accrue to the carriers, for if the prophesies of the interior plants and of the Florida commission are justified, practically all shipments would be made from the ports with the result that the total charges would probably be no greater than they now are."

It is difficult, indeed almost impossible, to follow the logic of the Commission in these two reports, both affecting the question of low intrastate rates within Florida, and higher interstate rates beyond Florida, on specific commodities, in the one case raising very materially and "freezing" for the future, every rate within and throughout the entire state of Florida for the hauls specified, and in the other case, finding itself powerless to make any such change whatsoever. This brief will discuss at greater length in another subdivision under this Point, the lack of proof that the intrastate rates on logs resulted in an unjust discrimination against, or burden upon, interstate commerce.

In any consideration of the difference between the Florida intrastate and the Florida to Georgia interstate rate levels, the Court should keep in mind that log traffic is obviously a traffic in natural resources; it is a shorthaul traffic, and "the great overwhelming movement is intrastate in character." (R. 495-502.)

These facts would seem to indicate that it is peculiarly and clearly a matter for state and not federal regulation. Rates for log traffic in the southeast are many and varied. (R. 479, 511.) It is not at all uncommon to find particular rates for particular movements determined by circumstances surrounding those particular movements. (R. 501.)

The scale prescribed by the Interstate Commerce Commission for application state-wide throughout Florida is the equivalent of the Alabama State scale. (R. 794, 795.) The mileage scales on intrastate log traffic in Georgia, and in North Carolina, and to a considerable extent in South Carolina, are lower than the Alabama scale. (R. 387-395.)

(c).—*The fact that the rates on logs intrastate within Florida are lower than certain interstate rates in the same general territory of movement on other low grade commodities, constitutes no justification for a state-wide order increasing the intrastate rates on logs.*

The report of the Commission shows that the earnings under the Florida intrastate rates on logs are materially lower than the earnings under the interstate rates from Florida to Georgia on brick, sand, lime, and cement; also, that they are lower than rates on sand and gravel in the Southeast. (R. 797-798.)

The evidence of this character before the Commission was pertinent on the issue of undue prejudice and preference as between particular persons, places, and commodities, and its weight would of course vary accordingly as the circumstances and conditions of the several transportations involved were similar or dis-

similar. But it is difficult to see where comparisons of this sort may be used by the administrative body as the basis of a finding of unjust discrimination against interstate commerce generally and upon a state-wide basis. As will be shown subsequently under this same topic of argument, there was no evidence of circumstances and conditions of transportation generally.

(*d*).—*There was no evidence before the Commission showing or tending to show similarity in the circumstances and conditions surrounding the transportation of log traffic intrastate within and throughout Florida and interstate from Florida to Georgia.*

The Commission found with respect to the transportation in interstate commerce and the transportation in intrastate commerce that:—

> "The transportation services in each instance are performed by defendant under substantially similar circumstances and conditions." (R. 799.)

The Court will observe that this finding constitutes the closing paragraph of the Commission's report. It is not found in the discussion by the Commission of the evidence of record before it. It follows the Commission's final conclusions on the entire matter where, logically, it should precede those conclusions. It bears unmistakable evidence of being an afterthought,—something considered to be necessary to support a conclusion that might otherwise have been considered defective because of its absence.

But the fact is that there was no evidence before

the Commission to demonstrate a similarity in the interstate and intrastate transportations involved. The complainant was without knowledge on that subject. (R. 705-706.) There was no interstate movement of logs from Florida to Georgia, and the Commission so found. (R. 796.) To be sure, the Commission further found that witnesses attributed this lack of interstate movement to the substantially higher level of the rates interstate than intrastate. But the fact is that these witnesses were a unit in the view that there could be no movement under the interstate rates under attack (and the prescribed rates are substantially the same) and this is mathematically demonstrable, as shown below. When these witnesses stated before the Commission that there would be a movement if the interstate rates were reasonable, they referred, in mentioning reasonable rates, to the rates then effective within the State of Florida (or substantially those rates) and which were disestablished by the order of the Interstate Commerce Commission in this proceeding (see *Ante,* pp. 8-10).

With no interstate movement of logs from Florida to Georgia whatever, the evidence before the Commission shows that there were very considerable intrastate movements within Florida; that these were regular movements, usually in trainload lots; that the logs were loaded on special log cars; that these log cars were taken from the defendant carrier's line by a privately owned log railroad into the timber and returned loaded and delivered to the carrier in trainload lots; that the trainloads thus delivered intact were hauled to the one destination of the particular shipper involved, and delivered intact at his mill with no detailed distribution service necessary as to individual cars; that the

reverse haul of empty cars was likewise a trainload movement of special equipment from day to day with no detailed assembly service at the origin or distribution service at the destination involved; and that, in all, it was a fast service, round trip of the loaded and empty cars being accomplished in 48 hours. See testimony of Perrin (R. 470, 471, 499, 500), Fleishel (600, 601).

Transportation of this character was admitted by the defendant before the Commission to be an economical and cheap service (Perrin, R. 476, 477). The same witness testified that there was some movement of logs intrastate within Florida in single carlots, and, a second time, that there was a substantial movement of this sort. But although the figures were in the possession of the carrier to demonstrate exactly how much movement there was in single carloads as distinguished from trainloads, no evidence to show such figures was offered. (See Perrin, R. 493, 513.)

Appellants therefore respectfully submit that the circumstances and conditions of transportation of logs intrastate within Florida and interstate from Florida to Georgia on the Atlantic Coast Line Railroad were not shown to be similar, and in fact were in practically all respects substantially dissimilar.

(e).—*There was no evidence before the Commission showing or tending to show that interstate Florida to Georgia and intrastate within Florida transportation of logs would be maintained on the rates prescribed by the Commission.*

The Commission's report, after first finding that there is no movement of logs from Florida to Georgia (R. 796) recites (R. 798):—

"The evidence is not convincing that logs could not or would not move from Florida to Georgia if the interstate rates and the Florida intrastate rates were on the same level."

The rates prescribed by the Commission are only a trifle lower than the rates complained against by the Georgia Public Service Commission, and these latter, according to the witnesses for the complainant before the Commission, would not permit the traffic to move. (R. 422-424; 427, 428, 429, 431, 433; 533; 557.) There was, to be sure, one witness who first insisted that the Florida intrastate rates would be the reasonable rates for interstate application, and subsequently was of the opinion that he would ship interstate on any rate parity (R. 533, 537). A second witness took the position that he could ship logs interstate from Florida to Georgia on any rate so long as it was no higher actually than the intrastate rate for the same haul within Florida. This testimony, and the particular circumstances under which it was given, is deserving of attention by the Court. At the first hearing before the Commission on this complaint, it quite definitely appeared on behalf of the Georgia Public Service Commission, and such Georgia lumbermen who supported it, that there could be no movement of logs interstate from Florida to Georgia except upon the then-effective intrastate rates within Florida. The witness in question, who took a somewhat contrary position, appeared at the second hearing before the Commission, and on that occasion testified (R. 545):

"I don't ship logs at all by railroad and I have had absolutely no experience in that. I have talked with practical lumber men to find out if it would be a practical thing to ship logs any great length

> and my impression is that it can be done with an equitable freight rate and other conditions. Of course every condition has to be considered, but, taking a log loaded on a car, I figure that if the rate were the same to me as it was to any competitor, why I have an even break with him. I have made calculations as to whether I could ship profitably from Florida to Georgia. I didn't have to do it myself. The Atlantic Coast Line did it for me."

Apparently the view expressed was not so much the view of this particular shipper as it was the view of the defendant Atlantic Coast Line Railroad Company.

The Court will take notice that this witness admitted that he was entirely without experience in the business concerning which he spoke. His hearsay information, received from other lumber men not named by him, left him merely with an "impression". The calculations upon which he said he relied were Providentially made and furnished to him by unnamed agents of the Railroad which was the defendant in the proceeding wherein the testimony was given and this occurred during the interim between first and second hearings of the matter before the Commission. Surely such testimony can hardly be said to constitute the "substantial" evidence upon which the Interstate Commerce Commission must rely in order to justify this invasion of the rights of a sovereign State.

The intrastate rates prescribed by the Interstate Commerce Commission under the powers of Section 13 must be such as will move the traffic and continue to produce the revenues for the carrier, otherwise the purpose of Section 13, interlocked as it is, with Section 15a, is not accomplished. This it would seem is recognized by this Court in the *Wiscon-*

sin case, supra, at page 591. In the instant case the Interstate Commerce Commission finds in terms that there then existed no interstate traffic in logs from Florida to Georgia and the evidence before it, except such as is discussed in detail just above, was clearly to the effect that there would be no interstate commerce in logs from Florida to Georgia except upon substantially the rates then effective within Florida. Indeed the Commission did not find as a fact that interstate traffic in logs would or could result if the interstate and intrastate rates were on the same level. The extent of the finding was that "the evidence is not convincing, that logs could not or would not move from Florida to Georgia if the interstate rates and the Florida intrastate rates were on the same level." (R. 798.)

The evidence before the Commission showed that to produce a given weight of milled lumber, it was necessary to move from the timber to the mill three times the weight of the lumber in rough logs (R. 412). For the haul of 158 miles,—the average haul on the Florida scale (R. 522),—the rate prescribed by the Commission for the transportation of these logs is 7.5 cents per 100 pounds (R. 801). It follows that to lay down 300 pounds of logs for the manufacture of 100 pounds of lumber in a south Georgia mill or at a mill in Florida for a haul of 158 miles, would cost 22.5 cents. This would be the equivalent of $112.50 for each carload of 50,000 pounds of milled lumber. There is no consequential difference in the rates on lumber as between mills in south Georgia and mills in north Florida (R. 384, 385) to the consuming markets for their output. Consequently no advantage would accrue to the shipper of logs as aforesaid in competition with a mill, of

which there are many, sawing lumber right in the timber and requiring no common carrier transportation of logs to the mill. The mill shipping logs on the Commission's rates, whether located in south Georgia or in north Florida, would operate under a handicap of $112.50 per average carload of 50,000 pounds of milled lumber.

There is not margin enough in the lumber manufacturing business to permit the absorption of any handicap of this sort (See R. 422-423, 427, 428), especially as the record shows that the competition of the finished product is not between Florida and Georgia manufacturers of lumber (for broadly speaking their products are sold in different markets, R. 604), but between all manufacturers of lumber reaching a particular market, with the price usually fixed by Pacific coast manufacturers (R. 425-426, 447, 448, 574, 603).

(f).—*There was no evidence before the Commission showing or tending to show that the Florida intrastate rates on logs constituted a burden upon interstate commerce, or that the increase ordered by the Interstate Commerce Commission in such rates was necessary to remove a burden upon interstate commerce.*

A significant feature of the decisions of this Court in the *Wisconsin* and *New York cases* was the reliance by the Court upon a money burden which the intrastate rates condemned in those proceedings by the Interstate Commerce Commission cast upon interstate commerce. This is more specifically referred to in the argument under Point IV. of this brief. There was no showing of any money burden upon interstate commerce resulting from the Florida intrastate rates on logs which the Interstate Commerce Commission con-

demned in this proceeding. The word "burden" is not to be found in the report of the Interstate Commerce Commission here under review.

The truth is that in the record before the Commission there were no facts from which the Commission could determine that there was a money burden upon interstate commerce by virtue of the Florida intrastate rates on logs. There was no showing of the amount of that tonnage. There was no showing of the gross revenues resulting from such transportation service within the State of Florida. There was a showing of total gross and net revenues of the carrier defendant before the Commission indicating its great prosperity, and that it needed no increases in rates (R. 704, 396). But there was no showing of the extent to which those revenues were or would be burdened by the Florida intrastate rates on logs, nor of the extent to which those revenues would be increased were those rates increased. The facts in all these respects were peculiarly facts in the possession of the defendant Atlantic Coast Line Railroad Company in the proceedings before the Interstate Commerce Commission. But that defendat, although it made a showing of its gross revenues from log transportation on its entire system ramifying throughout the southeastern states, for just one month (R. 287) testified with respect to the Florida intrastate log revenue to no more than the following:—

> "We have no figures to segregate one special movement from any other part of the general movement of logs. So far as the amount of revenue is concerned, under the trainload movements under the Cummer scale, I cannot estimate it. Of course I do know that the movement under these

> log contracts in every-day train movements is a very large movement of logs. As to whether it constitutes a very large proportion of the total revenue derived by the Atlantic Coast Line Railroad for the transportation of logs throughout its whole system, I would have to prepare statistics to say. I would not try to estimate it." (Perrin, R. 514-515.)

What the Interstate Commerce Commission found was that the Florida intrastate rates were "less than reasonably compensatory (R. 798), and further, that:—

> "The evidence is not convincing that logs could not or would not move from Florida to Georgia if the interstate rates and the Florida intrastate rates were on the same level." (R. 798.)

This raises the question, how would the Commission know that the rates were less than reasonably compensatory. The evidence did, to be sure, show that the rates on logs intrastate were on a lower level than the rates on logs interstate, or than the rates on certain other low grade commodities. But this, as is shown elsewhere herein, does not necessarily imply that the intrastate rates on logs are unreasonably low or noncompensatory. Comparisons of that character are of little value unless there is a showing of the extent to which the services of transportation on the rates compared are similar, and as already shown there was no evidence of that sort. *Smyth vs. Ames, supra,* p. 540. On the other hand, the evidence before the Commission quite positively showed that the log traffic within the State of Florida was conducted under somewhat unique circumstances and conditions which the defendant Atlantic Coast Line before the Commission admitted were conducive to low cost of transportation (*Ante,* pp. 39-40).

The Commission also had before it evidence purporting to show the cost of log transportation in trainloads within the State of Florida, between particular stations. There was a showing of that sort by the defendant Atlantic Coast Line, and a critical analysis of it by the Florida Railroad Commission. Both showed that the intrastate rates left to the Atlantic Coast Line some measure of profit and the showing of the Florida Commission indicated that that measure of profit was quite considerable. But these cost studies the Commission disregarded with the statement that (R. 797):—

> "Both cost studies are based on certain arbitrary assumptions and both are based on movements in trainloads from two points of origin to one destination. Neither can be accepted to show the approximate actual cost of transporting logs in single carloads intrastate throughout Florida."

This finding, it would seem, is a clear disregard of these cost studies by the Commission as unreliable; it was not merely a case of the Commission ruling out the basic facts shown, as was stated by the Court below (R. 169). Furthermore, while the facts which definitely show the extent to which the Florida intrastate traffic was handled in trainloads or in single carloads were again facts peculiarly within the possession of the defendant Atlantic Coast Line Railroad Company, that defendant did not apprise the Commission of the exact situation, and went no farther than the testimony of its traffic manager that the Coast Line handled some single car loads (Perrin, R. 493), and again, that "there is a good substantial movement other than that that is moving in regular trains", but he could not say just how many. (Perrin, R. 513.)

But as this Court and the Commission itself has had occasion to observe, it takes more than intrastate rates and losses on intrastate rates to constitute a burden upon interstate commerce. Rates of themselves do not produce revenues. Revenues are derived from the transportation of tonnage upon rates. It is therefore necessary to consider in every instance where the question of a burden upon interstate commerce by virtue of intrastate rates arises, whether or not other intrastate rates would move the traffic and produce the tonnage which would in turn produce revenue. This is emphatically shown by the decision of the Court in the *Wisconsin case, supra,* where, after justifying the order of the Interstate Commerce Commission requiring the increase of the Wisconsin intrastate rates, the Court further said (page 591):

> "It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception."

It may be noted that in the order of the Commission here under review, there was no such saving clause as the Court mentions in the foregoing quotation.

We refer in this same respect to the recent decision of the Interstate Commerce Commission in the *Florida Fertilizer case, supra,* at 609. There the Commission said:

> "Furthermore, it is not certain that if the Florida intrastate rates were increased to the inter-

state level, additional revenue would accrue to the carriers, for if the prophesies of the interior plants and of the Florida commission are justified, practically all shipments would be made from the ports with the result that the total charges would probably be no greater than they now are."

This language is a distinct recognition by the Commission of that which it seems to have overlooked in the log case here under review. The fact of the matter is that the testimony of the log case embraced the same predictions by the Florida log shippers to the effect that increases in the Florida intrastate rates would destroy the traffic and in fact reduce the revenues of the defendant carrier. This testimony the Commission adverts to in its Report (R. 797-798). But not only did the Florida log shippers testify to this effect. Such, indeed, was the testimony of the Georgia Commission and of the Georgia lumbermen who appeared before the Commission in support of the complaint of the Georgia Public Service Commission seeking the application interstate from Florida to Georgia of the then effective lower Florida intrastate rates. These witnesses made it clear that logs would not move from Florida to Georgia on the interstate rates complained against, and it is to be noted that the interstate rates prescribed by the Commission constituted no material reductions as compared with the interstate rates complained against by the State of Georgia (R. 404, 422, 427, 533).

The Court should particularly observe that the finding of the Interstate Commerce Commission in the log rate case is not a positive finding that the Florida intrastate rates constituted a burden upon interstate commerce. It is not a positive finding that even at the

rates prescribed for application within the State of Florida the traffic would continue to move; there was no finding at all that the traffic would continue to move within the State of Florida; there was merely the negative finding that (R. 798):

> "The evidence is not convincing that logs could not or would not move from Florida to Georgia if the interstate rates and the Florida intrastate rates were on the same level."

In the proceeding before the Commission, these appellants as interveners, in entire honesty and sincerity emphatically demonstrated that these higher intrastate rates would destroy the traffic, and that, instead of removing a burden upon interstate commerce, the Commission by increasing the Florida intrastate rates would merely create a burden. The Commission refers to that testimony at some length in its report in the log case (R. 797).

We submit that taking the report of the Commission in the *Florida Fertilizer case, supra,* as a consequence of which the Commission refused to permit any increase in the Florida intrastate rates on fertilizer, and the report in the Florida log case, wherein the Commission increased the intrastate rates on logs in Florida, this Court will be convinced that the more emphatic demonstration of an entire loss of state traffic was made by these appellants as interveners before the Commission in the latter proceeding. This is the more so because the certainty of such loss is mathematically demonstrable, as already shown, in the log case, *ante,* pp. 43-44.

Point III.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION WAS MADE WITHOUT THE FULL HEARING REQUIRED AS PRECEDENT THERETO BY THE INTERSTATE COMMERCE ACT.

(This is applicable to Assignments of Error XVIII., XXV., and XXVI.)

In the recent case of *Truax v. Corrigan*, 257 U. S. 312, 332, this Court said:—

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

Those provisions of the Interstate Commerce Act which provide a "full hearing" as a necessary precedent to any action either upon complaint or upon investigation on the Commission's motion fixing rates for the future are found in Section 15. Of these provisions this Court said in *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91:—

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless." * * *
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly rec-

> ognized that administrative orders, *quasi-judicial* in character, are void if a hearing was denied, if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (citing many cases), or if the facts found do not, as a matter of law, support the order made (citing cases)."

More recently in the *New England Divisions case* (*Akron, C. & Y. R. Co. v. United States*, 261 U. S. 184, 200), this Court further said:—

> "Whether a hearing was full must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

And in *Baltimore & O. R. Co. v. United States*, 264 U. S. 258, 265, the Court added that:—

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it."

These appellants respectfully submit that the proceeding before the Commission as a result of which the rates on logs intrastate within Florida were fixed by the Interstate Commerce Commission and removed entirely from the purview of the Florida authorities was not the full hearing guaranteed by the Constitution and by Section 15 of the Interstate Commerce Act.

It is pertinent to point out that the traffic in question was definitely shown by the evidence before the Commission to be a short haul traffic and over-whelmingly

intrastate in character. The regulation of the rates applicable to it was therefore peculiarly a regulation of rates and of a class of rates that should be left to the authorities of the State. This, it would seem, was a case where there was such serious doubt that it should have been resolved in favor of the State power. See *Arkansas Railroad Com. v. Chicago, R. I. & P. R. Co.*, 274 U. S. 597, 603.

But consider the manner in which the complaint was brought to the Federal body. It was made by the rate regulating body of a neighboring state; the complaint prayed for action by the Interstate Commerce Commission only on interstate rates; the complainant upon hearing made it clear that it made no attack whatever upon the Florida intrastate rates, and, indeed, seized upon those rates as the criterion of what the interstate rates should be; the defendant before the Commission made no attack upon the intrastate rates.

Contemporaneously, the intrastate rates on the same commodity, logs, applicable within the neighboring and complaining state of Georgia were shown to be lower than the interstate rates under attack, and intrastate log rates in the Carolinas were likewise shown to be lower. It is difficult to understand why, in the face of these facts, the Interstate Commerce Commission should still have persisted in the view that the Florida rates for this single railroad were not only to be fixed by it for the future, but that this might be done regardless of the fact that thereby Florida was ousted of its jurisdiction over log rates permanently, while Georgia and the Carolinas were left free as before, to regulate their own rates on the same railroad.

With no plea whatever to the Interstate Commerce Commission that the Florida intrastate rates be raised,

and with no evidence, as we contend is amply demonstrated elsewhere herein, to show that such rates should be raised, the situation was one, appellants submit, in which the Commission should have recognized that comity between states required a different method of procedure. If the rates within one of these states were to be raised, the Commission, as it might have done under its power to investigate all these rates on its own motion, should have considered the *entire* question in the *entire* southeast, or certainly in Florida, Georgia, and the Carolinas. This would have accorded similar treatment to all and would not have produced the rather ridiculous situation in which log rates now are, with the rates in Florida frozen tight by action of the Interstate Commerce Commission, and with rates in Georgia and in the Carolinas left at a lower level, and solely within the purview at least in the first instance of the respective state commissions.

But these appellants further insist that Congress never intended by the amendments of Transportation Act, 1920, to empower the Interstate Commerce Commission to prescribe intrastate rates, state-wide, without exception, in any proceeding such as this.

The only specific power conferred by the Statute upon the Interstate Commerce Commission to fix intrastate rates is that found in Section 13 (4) of the Act. And this power the Commission is authorized to employ only

> "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one

> hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, * * *."

The words "in any such investigation" in Section 13 (4) obviously relate back and refer to the language of the preceding paragraph, Section 13 (3). This begins

> "Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, * * *."

In other words, the power of the Commission to fix intrastate rates under Section 13 (4) can be employed only in those investigations contemplated by the provisions of the Act wherein "there shall be brought in issue" the state rate.

The statute names five classes of proceedings wherein the Commission may fix rates for the future:—(1) The proceeding upon complaint by "any person, firm, corporation, company, or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carriers," under Section 13 (1); (2) The proceeding upon complaint "by the railroad commissioner or railroad commission of any State or Territory," under Section 13 (2); (3) The "inquiry, on its own motion," instituted by the Commission "in any case and as to any matter or thing

concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act," under Section 13 (2); (4) The "investigation instituted upon petition of the carrier concerned," in which "there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any state," under Section 13 (3); and (5), the investigation made by the Commission "in extension of any pending complaint," under Section 15 (1).

As already said, the proceeding before the Commission was distinctly of the "Complaint and Answer" variety,—an adversary proceeding between the complainant and the carrier authorized to be filed by Section 13 (1) and more specifically authorized to be filed by a State Railroad Commission under Section 13 (2). There was no inquiry by the Commission on its own motion into subjects of investigation named by it—no proceeding on its own motion, in other words, under Section 13 (2). There was no petition by the Atlantic Coast Line Railroad Company, or by any other carrier (if any) concerned, for any investigation of the Florida intrastate log rates, under Section 13 (3). And finally, there was no order of the Commission by way of extension of the investigation of the pending complaint of the Georgia Public Service Commission, under Section 15 (1). There was nothing before the Commission requiring any investigation by it or requiring any action or any order fixing rates for the future by it, except the complaint of the Georgia Public Service Commission.

The only manner in which the Florida intrastate rates on logs were brought in issue before the Interstate Commerce Commission by the complaint of the Georgia Public Service Commission was in the allegation of unlawfulness in the *relationship* between those rates and the interstate rates on logs from Florida to Georgia for hauls of the same length. There was no attack whatever by the Georgia Public Service Commission against the *level* of the Florida intrastate rates on logs. Indeed, the Georgia Public Service Commission, far from attacking the level of the Florida intrastate rates as unreasonably low, insisted that those rates constituted a fair measure of what the interstate rates should be for the transportation of logs from Florida to Georgia, and the complaint of the Georgia Public Service Commission fundamentally was directed against the unreasonably high level of the interstate rates from Florida to Georgia. (R. 193-197.)

It cannot be lost sight of that the complaint of the Georgia Public Service Commission brought the Florida intrastate rates within the purview of the Interstate Commerce Commission only on the issue of relationship. Only with respect to the issue of relationship, therefore, could the Interstate Commerce Commission have acted under that complaint. Moreover, its action must necessarily have been restricted territorially to the territorial scope of the primary relief sought, and this, as elsewhere shown herein, was found by the Commission itself and by the District Court also, to be limited to north Florida (R. 792 and R. 50). When, therefore, the Interstate Commerce Commission, as its final amended order actually did, prescribed rates on logs "within and throughout the entire

State of Florida, without exception," the Interstate Commerce Commission went beyond the scope of the proceedings in which it purported to act and went beyond the limited statutory power which it possesses in the premises.

We say that Congress never intended by the enactments of 1920 to authorize the Interstate Commerce Commission to prescribe intrastate rates upon a state-wide basis in any proceeding such as this. Were it conceded that the Commission has that power, it would necessarily follow that the Federal Government could prescribe state-wide state rates, from the standpoint of both relationship with interstate rates and of level, in any proceeding which brings in issue the relationship between an interstate and an intrastate rate prevailing in any portion of a State, however trifling that portion may be. Surely if such broad powers were intended by Congress to be conferred upon the Interstate Commerce Commission, it would be in language more direct and positive than what is found in Section 13 (4) of the Interstate Commerce Act.

The District Court, in reaching the conclusion that there had been the full hearing guaranteed by the statute, seemed to think that the rights of the appellants had been prejudiced because (sic) after the Examiner had expressly found that the Florida intrastate rates were not unremunerative nor burdensome, these appellants discussed that finding in replying to other parties' exceptions to the Examiner's report and did not contend that that evidence was foreign to the investigation. Further, the Court was influenced by the fact that when these appellants as interveners before the Commission made application for rehearing they failed to ask for a re-opening for the presentation of

further evidence, but merely asked for a re-argument on the evidence already taken.

Even if the Court were wholly correct in its statement of what was done by the appellants in this connection (which we deny) it would be sufficient to say,—

(a) That Constitutional rights will not be deemed to have been so lightly waived in any such manner as this, or,

(b) That administrative power not conferred by the Interstate Commerce Act itself, and indeed prohibited by the Constitution, cannot be lodged in the Interstate Commerce Commission in any such way as this.

But the record demonstrates there was no waiver or recognition of power by the appellants or any admission, express or implied, that the hearing was full or that the Commission had the power to make a revenue order.

From the very beginning the appellants denied the power of the Commission and the sufficiency of the evidence, and saved this point not once but many times throughout the record. At the conclusion of the complainants' evidence the appellants filed a written motion (R. 211, R. 467) expressly challenging the power of the Commission and the sufficiency of the evidence, and expressly reserved their rights in the premises. The presiding Examiner did not rule on this motion but referred it to the Commission itself (R. 467). After all of the evidence of all other parties had been submitted the appellants again insisted upon that motion, and expressly announced that any testimony offered by them was without prejudice to that motion (R. 562).

It was in this state of the record that these appellants as interveners before the Commission and with-

out prejudice to any rights of theirs in the matter submitted such evidence as they deemed might be pertinent should the Commission overrule their motion, *but not addressed to a revenue case.* Then, after the issue of a proposed report by the Commission's Examiner favorable to the contentions of these appellants, and after exceptions had been filed to that report by other parties, these appellants as such interveners again found it incumbent upon them, because the Commission had not yet ruled upon the aforesaid motion, to reply to such exceptions. At that time and in that reply appellants expressly stated that (R. 779),

> "There are no issues before this Commission calling for the fixation of minimum reasonable rates on Florida intrastate traffic. No such issue was tendered in the complaint and most certainly the complainant made no effort to set up such a case in its evidence."

And this, of course, was again without prejudice to their interest and rights in the matter for those had been saved by the motion which had not, up to this time, been acted upon by the Commission. Indeed, it was not until the Commission finally disposed of the controversy on its merits that the motion was formally denied (R. 792).

Again, the very report of the Interstate Commerce Commission itself shows (R. 792) that at the hearing *before the Commission* the appellants were still insisting upon the insufficiency of the evidence and the want of power on the part of the Commission. For then and there in that report the Commission in terms denied the motion on the part of the appellants to dis-

miss, and over the protest of the appellants held that the evidence justified the consideration of the case on its merits.

Furthermore, the trial court entirely overlooked the fact that in the petition for reconsideration and reargument addressed to the whole Commission the appellants did the very things that the trial court said the appellants ought to have done, though we submit that in the state of the record it was wholly unnecessary for the appellants to have done so. In that petition the appellants not once but several times denied that there was power in the Commission to make a revenue order under the restrictive issues and the evidence in the case (R. 819, R. 831-835). And so there was no recognition or waiver either in law or in fact.

Appellants submit in conclusion upon this point that there was not that full hearing which the statute provides, and which the Constitution guarantees, and that both the Interstate Commerce Commission and the Court below failed to recognize the word of caution expressed by this Court with respect to the proper handling of this class of cases in *Lawrence v. St. Louis-San Francisco Ry. Co.*, 274 U. S. 588, 594-595, where it said:—

> "But as bearing upon the propriety of issuing the temporary injunction, the fact is important that the controversy concerns the respective powers of the nation and of the states over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the state and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But public interest demands that

> whenever possible conflicts between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily, hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law, be deferred to."

This case, and this very language, was approved by this Court only so recently as March 12th, 1930, in *R. R. Commission of Wisconsin v. Maxcy,* Advance opinions, p. 337, 338, where the court said:

> "The importance is even greater where the decree enjoins the enforcement of a State law or the action of State officials thereunder. For then the respect due to the State demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown."

Point IV.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION WAS BEYOND THE SCOPE OF ITS STATUTORY POWER.

(This is applicable to Assignments of Error II. and XIX.)

> "The intention to interfere with the state function of regulating intrastate rates,"

said this Court in a recent case,

> "is not to be presumed. Where there is serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the State power." *Arkansas Railroad Com. v. Chicago, R. I. & P. R. Co.,* 274 U. S. 597, 603.

However, under certain oircumstances there was power in the Interstate Commerce Act as it stood before the amendments of Transportation Act, 1920, to reach into the confines of an individual state and regulate intrastate rates. This was an incident of the power in section 3 of the Interstate Commerce Act, to cause the removal of undue preference and prejudice. In the *Shreveport Case* (*Houston, E. & W. T. R. Co. v. United States*), 234 U. S. 342, (1914) this Court upheld such an exercise of power by the Interstate Commerce Commission.

But the power of the Commission under Section 3 was by no means a power to regulate intrastate commerce generally. It was limited to the particular instances of undue prejudice and preference as between interstate and intrastate commerce shown to exist in the evidence before the Commission. And the demonstrated existence of specific instances of undue prejudice and preference as between the intrastate and interstate commerce were held by this Court not sufficient to justify an order by the Interstate Commerce Commission requiring state-wide increases in intrastate rates. *American Exp. Co. v. South Dakota ex rel. Caldwell*, 244 U. S. 617 (1917). This was so even though the Interstate Commerce Commission additionally found that the state rates giving rise to the undue preference also imposed "an unreasonable and unlawful burden on interstate passenger traffic." *Illinois C. R. Co. v. Public Utilities Com.*, 245 U. S. 493 (1918) and see *Business Men's League of St. Louis v. A. T. & S. F. Ry. Co.*, 41 I. C. C. 13, 28.

By the amendments of Transportation Act, 1920, there was for the first time incorporated within the Interstate Commerce Act (Section 13 (3) and (4)) a

denouncement of any "undue, unreasonable, or unjust discrimination against interstate or foreign commerce." And the Commission, in Section 13 (4), was specifically empowered to take action to remove such discrimination.

The Wisconsin Case (*Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563 (1921)) brought to this Court for review an order of the Interstate Commerce Commission, based upon a finding that lower passenger fares within Wisconsin as compared with higher passenger fares between Wisconsin and points elsewhere, resulted (*Wisconsin Passenger Fares*, 59 I. C. C. 391, 396) :—

> "in undue prejudice to persons traveling in interstate commerce within the state of Wisconsin and between points in the state of Wisconsin and points in other states; in undue preference of and advantage to persons traveling intrastate in Wisconsin; and in unjust discrimination against interstate commerce."

The Commission's order was state-wide, requiring the increase of all passenger fares within and throughout Wisconsin from the basis of 3 cents per mile to the basis of 3.6 cents per mile. This Court first found and held (pp. 579-580) :—

> "The order in this case, however, is much wider than the orders made in the proceedings following the *Shreveport* and *Illinois C. R. Co. cases*. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the State to border points. But this order is not so

restricted. It includes fares between all interior points, although neither may be near the border, and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. * * * We cannot sustain the sweep of the order in this case on the showing of discriminations against persons or places alone."

But the Court further took particular notice of the (then) new denouncement of "undue, unreasonable, and unjust discrimination against interstate or foreign commerce, which the Interstate Commerce Commission may remove by raising the intrastate fares." (p. 581) Taking cognizance of the Commission's finding that the lower Wisconsin fares would produce millions of dollars less revenue for the railroads than would the higher interstate fares (p 566), the Court said (p. 585):—

"The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill."

Of Section 15a, also a product of Transportation Act, 1920, the Court had previously said (p. 584):—

"The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole,

> or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years, the return is to be 5½ per cent, with ½ per cent for improvements, and thereafter is to be fixed by the commission."

In this view of the situation confronting the Commission and under review by the Court, it was held that (pp. 589-590):—

> "Congress, in its control of its interstate commerce system, is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. (Citing cases) In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

Simultaneously, this Court decided the *New York Case* (*New York v. United States*, 257 U. S. 591), wherein were raised questions similar to those dis-

posed of in the *Wisconsin Case*. The Court said (p. 601):—

> "The main objections to the order are the same as those presented, considered, and overruled in the Wisconsin Rate Case, just decided,"

and then proceeded to show and rely upon the fact that the state rates which the Interstate Commerce Commission had condemned would result in annual gross operating revenues

> "less, by nearly twelve millions of dollars, than those revenues (would be) if the intrastate fares and rates were on the same level as the interstate rates, as fixed by the Interstate Commerce Commission." (p. 601.)

The point to be observed is that this Court has found it impossible to justify state-wide prescription of intrastate rates by the Federal Government save where such was definitely shown to be necessary in order to remove state-wide undue preference with resulting undue prejudice against interstate commerce, or, since 1920, an unjust discrimination against interstate commerce so substantial as to result in a "burden" upon that commerce. This was recognized by the Court below (R. 168). No case has been found where a state-wide prescription of intrastate rates has been justified without substantial evidence to this effect. What is more, this Court has carried the same principle into its decisions touching upon the power of the Federal Government to regulate phases of discriminations against interstate commerce other than those effected in rate adjustments.

Thus, with respect to the action of the Federal Commission touching upon the abandonment of railroad properties located wholly within a state, this Court has pointed out that the Interstate Commerce Commission cannot permit or require such abandonment where continued operation of the property in question solely in intrastate commerce is merely a matter of local concern and,

> "interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line, and thereby affect its utility or service as an artery of interstate and foreign commerce." *Texas v. Eastern Texas R. Co.,* 258 U. S. 204, 216, 217.

In another instance where the Federal action authorizing abandonment was upheld, this Court relied upon the fact that,

> "The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discriminations." *Colorado v. United States,* 271 U. S. 153, 162.

The same conception of the necessity for that power in the Federal Government,—to protect interstate commerce against the imposition of undue burdens by State action,—is found in the decision of this Court in *Lehigh Valley R. Co. v. Board of Public Utility Comrs.,* 278 U. S. 24. There, commenting upon state orders requiring the elimination by railroads of grade

crossings at very considerable expense, which orders, it was contended, imposed a direct burden upon interstate commerce in violation of Section 15a, the Court said (p. 35):—

> "It is not necessary for us to controvert the proposition that unreasonably extravagant grade crossings are to be enjoined not only as violations of the 14th Amendment but also as forbidden by the Transportation Act."

There arises, therefore, the question, what, in the evidence before the Commission showed that the Florida intrastate rates resulted in a burden upon, or otherwise constituted, an unjust discrimination against interstate commerce?

The evidence before the Commission was directed to the situation in north Florida. This is recognized by the Commission in its report (R. 792) and by the District Court in its opinions (R. 50, 168). Indeed, in its first opinion the District Court expressly held, with respect to the proceedings before the Commission, that (R. 50):

> "Although the complaint covered the whole of Florida, the real contention, and the Commission's own action upon the interstate rates, were limited to that northern territory, and the evidence related only to it."

And accordingly, that Court there held in effect that the evidence before the Commission was probably not sufficient to support a "state-wide" order (R. 51).

The evidence before the Commission, as the Court will recognize, was of the character usually offered to prove undue prejudice and preference as between

specific persons, places, and commodities, in violation of Section 3. As summarized by the Court below in its consideration of the matter it included (R. 169), (a) evidence of the cost of the intrastate service in Florida; (b) comparisons of the rates on logs intrastate within Florida with log rates elsewhere; and (c) comparisons of the rates on logs intrastate within Florida with rates on other low-grade commodities. There was a showing of the gross revenues derived by the defendant from the transportation of logs over its entire system throughout the southeastern states for one month (R. 287). This, it was explained, of course included "the revenue which the Atlantic Coast Line derived from the transportation of logs under the so-called Cummer (*i. e.*, the Florida intrastate) scale." But specifically as to the latter, the witness presenting this statement said (R. 514, 515):

> "We have no figures to segregate one special movement from any other part of the general movement of logs. So far as the amount of revenue is concerned, under the train load movements under the Cummer scale, I cannot estimate it. Of course I do know that the movement under these log contracts in every-day train movements is a very large movement of logs. As to whether it constitutes a very large proportion of the total revenues derived by the Atlantic Coast Line Railroad for the transportation of logs throughout its whole system, I would have to prepare statistics to say. I would not try to estimate it."

The complainant before the Commission, as shown elsewhere herein, not only disavowed any attempt to make the proceeding "a revenue case," but also prayed for the application of the Florida intrastate scale to interstate traffic, Florida to Georgia.

There was, therefore, no evidence before the Commission of a revenue burden, such as was definitely shown to exist in the *Wisconsin* and *New York cases.* The Commission's report says nothing about any burden upon interstate commerce. The lower Court, however, found that the intrastate rates were "on the face of things * * * too low, and likely to burden the carrier". (R. 169.) To reach this conclusion that Court evidently exercised its own judgment upon the evidence before the Commission. This it had no right to do. Furthermore, as appellants believe is amply demonstrated herein under Point II., there was no substantial evidence before the Commission to prove that the intrastate Florida scale of rates was, as the Commission put it, "less than reasonably compensatory" (R. 798), or, as the Court below put it, "obviously unremunerative" (R. 169).

In conclusion upon this point, therefore, appellants respectfully submit that there was before the Commission no evidence that the Florida intrastate rates constituted a burden upon or unjust discrimination against interstate commerce. Such evidence as there was otherwise, even if persuasive of particular instances of undue prejudice and preference as between intrastate and interstate traffic in logs (which we deny) could not sustain the broad sweep of the order "within and throughout the entire state of Florida, without exception."

Point V.

THE INTERSTATE COMMERCE COMMISSION, IN CONDEMNING EXISTING RATES AND IN FIXING RATES FOR THE FUTURE, IS NOT AUTHORIZED OR EMPOWERED TO "SUPPLEMENT" THE FACTS SHOWN OF RECORD BEFORE IT, OR TO RELY UPON "THE COMMON KNOWLEDGE AND SKILL IN RATE MATTERS THAT THE INTERSTATE COMMERCE COMMISSION, THE GEORGIA AND FLORIDA STATE COMMISSIONS, AND THE RAILROADS MUST HAVE IN SUCH MATTERS."

(This is applicable to Assignments of Error XXI. and XXII.)

Commenting upon the fact that the parties before the Commission were interested mostly in, and the great bulk of the evidence before the Commission related to, north Florida, the Court below said (R. 168-169):

> "* * * but in addition to the common knowledge and skill in rate matters that the Interstate Commerce Commission, the Georgia and Florida State Commissions, and the railroads must have in such matters, there was a presentation in the evidence by the Coast Line and by the Florida Commission, respectively, of the cost of service under the attacked rate and of its remunerativeness. Certainly no other litigant could have known the facts better than they. In rejecting the conclusion of slight net income asserted by the witnesses, the Commission did not rule out the basic facts shown, but was at liberty to supplement them and construe them for itself, and make its own conclusion from them." *State of Florida v. United States*, 31 F. (2d) 580, 582.

Then, after referring to certain rate comparisons considered by the Commission, the District Court reached the conclusion that (R. 169):

> "We cannot say the order is without evidence to sustain it, on the ground that the former state rate was an undue discrimination against general interstate commerce over the Coast Line Railroads."

In this understanding of the law your appellants respectfully submit the Court below was entirely in error. There is, of course, high authority to the effect that a tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others. *O'Keefe v. United States*, 240 U. S. 294, 303. But, as the context of that decision shows, the inferences which the Commission may be presumed to be able to draw, must be drawn from the evidence before it. This is clearly to be deduced from the decisions of this Court in *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, and *United States v. Abilene & S. R. Co.* (the *Orient Divisions Case*), 265 U. S. 274. In the first of these cases this Court said:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless." *Interstate Commerce Com. v. Louisville & N. R. Co., supra*, page 91.

In the *Orient Divisions case*, pp. 287, 288, this Court said:

> "The contention of the Commission is that, because its able examiner gave notice that 'no doubt it will be necessary to refer to the annual re-

ports of all these carriers,' its Rules of Practice permitted matter in the reports to be used as freely as if the data had been formally introduced in evidence.

"The mere admission by an administrative tribunal of matter which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, does not invalidate its order. (citing cases) But a finding without evidence is beyond the power of the Commission. Papers in the Commission's files are not always evidence in a case. (citing cases) Nothing can be treated as evidence which is not introduced as such."

Relying upon the authorities thus quoted, appellants say that the Court below made a most serious error in attempting to justify the order of the Commission on any theory that while the facts before the Commission were not sufficient to justify the order, the Commission might first "supplement" those facts, and second, apply its "common knowledge" thereto, or with such common knowledge, to further supplement the facts of record before it. That is precisely what the Commission attempted to do in the *Orient Divisions case, supra,* and it was for just that reason that the order of the Commission was there condemned.

It is difficult to understand exactly what the Court below meant in its suggestion that the Interstate Commerce Commission could rely upon the common knowledge and skill of the Georgia and Florida State Commissions and the railroads. For the fact is that the Georgia Commission, relying upon its skill, did its utmost in the proceedings before the Interstate Commerce Commission to prove that the rates which the Interstate Commerce Commission should make effective for the in-

terstate transportation of logs from Florida to Georgia should be the Florida intrastate scale of rates which the Interstate Commerce Commission subsequently condemned. Apparently, therefore, there was no reliance by the Interstate Commerce Commission upon any particular common knowledge or skill possessed by the Georgia Commission. Again, the Florida Commission supported the Florida intrastate rates in the proceedings before the Interstate Commerce Commission and offered voluminous expert evidence designed to show, as we believe that evidence did show, that the Florida intrastate rates on logs were remunerative rates. But this product of the common knowledge and skill of the Florida Commission was entirely disregarded by the Interstate Commerce Commission.

Beyond this your appellants deny that the Interstate Commerce Commission is entitled to rely upon any common knowledge or skill of the railroads. Whatever knowledge, and whatever skill the railroads may possess in the matter of rate-making must be demonstrated not only to the satisfaction of the Interstate Commerce Commission, but in such manner that adversaries before the Commission may have opportunity to test that common knowledge and skill of the railroads. This implies, on the authority of the cases cited under this point, that such common knowledge and skill as the railroads possess in matters of rate-making must be displayed as evidence before the Interstate Commerce Commission and subjected to the usual right of cross-examination by adversary parties. This, appellants think, was not appreciated by the Court below.

Concluding on this point, appellants submit that to the extent that the Commission had to "supplement"

the record before it, and rely upon "common knowledge" of facts as justification for its order, that order was unlawful and void.

Point VI.

THE INTERSTATE COMMERCE COMMISSION WAS WITHOUT POWER TO REGULATE AND FIX THE INTRASTATE RATES FOR TRANSPORTATION OF LOGS WHOLLY WITHIN THE STATE OF FLORIDA BECAUSE SAID RATES WERE VOLUNTARILY INITIATED AND MAINTAINED IN EFFECT BY THE CARRIER AND WERE NOT RATES MADE OR IMPOSED BY AUTHORITY OF ANY STATE" WITHIN THE DESCRIPTION OF SECTION 13 (3) AND (4) OF THE INTERSTATE COMMERCE ACT.

(This is applicable to Assignments of Error X. and XV.)

The law under which the Interstate Commerce Commission must act in fixing intrastate rates within and throughout the confines of any one state is found specifically in Section 13 (3) and (4) of the Interstate Commerce Act. In paragraph (4) it is provided that:—

> "Whenever, in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the

> classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination."

The reference in paragraph (4) to "any such investigation" relates back and refers to the language of paragraph (3), which reads:—

> "Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. * * *."

Your appellants respectfully submit that the purpose of these two paragraphs of Section 13 would seem to be entirely clear, and to require that any state-wide adjustment of intrastate rates by the Interstate Commerce Commission should be undertaken only when demonstrated to be necessary to prevent unjust discrimination against interstate commerce, and *only* after the state itself had first sat in judgment on the issue of the lawfulness of those intrastate rates.

This view seems to be recognized by the Commission itself in some of the State rate cases which have come before it. Thus, in a case which arose shortly after the passage of Transportation Act, 1920, the Commission said:—

> "Prior to June 1, 1917, the scales were single line and rates over two or more lines were constructed on combination. On that date the State commission ordered that for joint-line application 1 cent per 100 pounds should be added to the rate prescribed for the continuous mileage. The carriers published these rates under protest. No attack is made by complainant on the increases resulting from General Order No. 28 of the Director General of Railroads." *Walsh Fire Clay Products Co. v. Director General,* 73 I. C. C. 410, 411.

This recital of the history of the rates there under review, we think, was sufficient to demonstrate that the intrastate rates involved fell within the description of paragraphs (3) and (4) of Section 13, and therefore were properly the subject of review by the federal regulatory authority. In *Rates on Powder and High Explosives,* 151 I. C. C. 155, the Commission had under consideration rates applicable within the State of Arizona. The report of the Commission recites (pp. 156-157):—

> "The carriers asserted at the hearing that they had exhausted their efforts in appealing to the Arizona Commission for relief before filing their petition here and they strenuously objected to the Arizona commission participating cooperatively with us in these proceedings on the ground that it amounts to that commission sitting in judgment upon its own order. While the Arizona commission did not reopen the proceedings in which the Arizona intrastate rates here complained of by the carriers were prescribed, it did, prior to the hearing herein, as above stated, institute another investigation on its own motion into the Arizona intrastate rate situation. Under all the circumstances it would seem that the joint hearing was within the purview of paragraph 3 of section 13 of the interstate commerce act."

Here, again, was a recital by the Commission of the historical facts surrounding the rates involved, showing that they were rates "imposed by authority" of a state, and to the conclusion that they were properly within the purview of paragraph 3 of Section 13.

A very recent decision of the Commission, *Rates on Chert, Clay, Sand, and Gravel,* 160 I. C. C. 309, decided December 9, 1929, is of particular significance in this connection because it is a subsequent decision in a case, the earlier decision of which was particularly relied upon by the Commission to support its order under review herein. It appears that in the earlier case, *Rates on Chert, Clay, Sand, and Gravel,* 122 I. C. C. 133, the Commission had under construction, *inter alia,* the intrastate rates on those commodities within the State of Georgia. With respect to such rates the Commission there said (pp. 169-170):—

> "There is of course no transportation reason for the maintenance of a different basis of intrastate rates on these commodities within Georgia than that herein found reasonable for interstate transportation. However, in view of the attitude taken by the Georgia commission in the past which we have above adverted to we do not now deem it necessary to make any finding or enter any order in No. 17517 for the future in so far as unjust discrimination against interstate commerce is there involved, because it is felt that the Georgia Commission will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment herein approved."

Apparently, the subsequent action of the Georgia Commission did not produce that "harmony with the interstate adjustment" which the Interstate Commis-

sion deemed necessary. The Interstate Commission therefore proceeded to further hearing in the matter of rates on chert, clay, sand, and gravel within the State of Georgia. Preliminary to its reconsideration of the rates in issue on their merits, the Commission then said (160 I. C. C. 309, 313):—

> "It is urged, on behalf of the Georgia Commission and other Georgia interests, that we are without jurisdiction to here enter an affirmative order because of the limited scope of the order reopening these cases for further hearing. It is contended that the proceedings should have been reopened also for the purpose of determining a reasonable basis of interstate rates.
>
> As heretofore stated, the 17517 scales were recently prescribed in these proceedings for interstate application after an exhaustive investigation and are now applied on interstate traffic throughout the greater part of southern territory. The only reason that no findings were made for the future or order entered in the original proceedings concerning the Georgia intrastate rates was because this commission, desirous of fostering and encouraging the spirit of cooperation between it and the State Commissions, 'felt that the Georgia commission will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment herein approved.' The Georgia Commission has authorized a revision. Respondents and others complained and are here contending that this intrastate revision is so out of harmony with the approved interstate revision that it has brought about an unlawful relationship. For the purpose of determining whether or not this is the fact, the proceedings were reopened and the further hearing had."

Here, again, is action by the Interstate Commerce Commission which seems to indicate the recognition on its part that it should attempt a state-wide adjustment of intrastate rates only after the state regulatory body itself has first sat in judgment on the lawfulness of those rates. In fact, the Interstate Commission here expressly postponed any action on the State rates, pending review thereof by the State Commission.

In the log case, here before this Court, the hearings before the Commission developed that the Florida Commission had issued no order respecting these rates. This was the expression of the traffic official who appeared on behalf of the Atlantic Coast Line, the defendant before the Commission, as its witness (Perrin, R. 494). Mr. Perrin further expressly recognied that in this proceeding neither the Florida nor the Georgia intrastate rates should be determined for the future (R. 496). At the very conclusion of the hearing before the Interstate Commerce Commission, it appeared that the Atlantic Coast Line had been invited for a period of six years to make any showing to the Florida Railroad Commission that the rate in Florida on logs was unreasonable, and that in the absence of such showing Chairman Wells of that Commission had concluded that the rate was reasonable. (R. 726-727.) Thus it is to be observed that the railroad which maintained in effect the rates which were under attack not only did not bring them in issue before the Commission, but defended their propriety when they were by others brought in issue before the Commission, and admitted they never had been fixed by the Florida State Commission.

The peculiar, and, indeed, the ironical phase of the situation is that the Florida intrastate rates were

brought in issue before the Federal commission by the Georgia authorities,—the same authorities to which deference was shown by the Interstate Commerce Commission when it refrained from establishing rates on chert, clay, sand and gravel within the State of Georgia, on the theory (mistaken, as it afterwards appeared) that the Georgia Commission would cooperate in authorizing such revisions as might be necessary "to bring their rates into harmony with the interstate adjustment." No such deference or consideration, despite the requirements of the statute, was shown to the State of Florida by the Interstate Commission in the proceeding here under review.

Note: The decided cases bearing upon this Point VI are very few. For this reason, and because "a practical interpretation of the law by the administrative body having its enforcement in charge * * * is entitled to weight," see *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 118, we take the liberty of referring to the brief recently filed by the Interstate Commerce Commission in this Court in support of its Petition for Writ of Certiorari in No. 768 of the October Term, 1929. Therein, in extended discussions of Section 13 (3) and (4) the Commission uses the phrase "state-made rates" time and again, apparently as synonymous with the words of the statute "made or imposed by authority of any state."

Point VII.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION CONSTITUTED AN ACT IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES.

(This is applicable to Assignments of Error II, XII., and XIX.)

In the first decision of the Court below, (speaking of the provisions of paragraphs (3) and (4) of Section 13), the Court said: (R. 46.)

> "No attack has been made before us upon the constitutionality of the enactment. Such an attack would probably be sufficiently met by what

was said in the suit of *Wisconsin Railroad Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563."

This reference to the *Wisconsin case, supra,* doubtless is to those portions of this Court's opinion found therein at pages 589-590.

But administrative action or power may be so used or abused as to invade Constitutional rights and as to violate Constitutional guaranties so as to entitle the State or the citizen to invoke the shield of the Constitution for its or his protection. See *Interstate Commerce Com. v. Illinois C. R. Co.*, 215 U. S. 452, 470. This point was raised by the original bill as well as by the supplemental bill, and was insisted upon throughout in the Court below (Original Bill, Para. 22, 23 (R. 884); Supplemental Bill, Para. XVI, Subdivisions F and G, (R. 924)).

The only authority under which the Interstate Commerce Commission could have issued the order which it did issue would have to be found in the existence of a state-wide unjust discrimination against interstate commerce by virtue of the intrastate rates which the Federal Commission condemned. This condemnation, as we believe has been amply shown in this brief elsewhere, was without justification of evidence. Such being the case, the action of the Commission was beyond the statute, and unconstitutional. It is unnecessary to cite authorities to support such a proposition beyond the case last cited.

Point VIII.

THE DISTRICT COURT, IN ORDER TO UPHOLD THE JURISDICTION AND ORDER OF THE INTERSTATE COMMERCE COMMISSION, RELIED UPON THE COURT'S OWN CONCLUSION WITH RESPECT TO THE PROPRIETY OF THE RATES IN CONTROVERSY, AND IN SO DOING EXERCISED ADMINISTRATIVE POWER NOT POSSESSED BY SAID COURT.

(This is applicable to Assignment of Error XXIII.)

It is to be borne in mind that when the District Court first considered the order of the Interstate Commerce Commission and the proceedings before that Commission which led up to the issue of that order it reached the conclusion that the order could not be sustained in its state-wide scope because (*State of Florida v. United States*, 30 F. (2d) 116, 120):

> "Although the complaint covered the whole of Florida, the real contention, and the Commission's own action upon the interstate rates, were limited to that northern territory, and the evidence related only to it." (R. 50.)

In its second consideration of the Commission's order the District Court again reached the conclusion that it could not be sustained in its state-wide scope (R. 168):

> "because of undue prejudice to shippers and localities, or because of undue discrimination against the *particular* interstate commerce in such logs." *State of Florida v. United States*, 31 F. (2d) 580, 581.

Its further consideration of the matter on the second occasion, however, led the Court to the conclusion that

the Commission's order must also be considered as possibly justifiable to remove a discrimination against what the Court termed "general" interstate commerce, as when the discrimination is such as to throw an undue burden upon interstate commerce.

When the second decision of the Court below is studied in detail it will be observed that in determining whether or not there was a discrimination against *general* interstate commerce, the District Court commenced with a repetition of its previous finding that:

> "* * * The parties appeared interested mostly in north Florida because of prejudice to shipments there, and the great bulk of the evidence related thereto * * *." (R. 168.)

Next, the Court considered, (1) the evidence which was before the Commission to show the cost of transportation on the Florida intrastate rates on logs, and, (2) the rate comparisons which were also before the Commission. From this consideration it was concluded that (R. 169):

> "On the face of things the log rate is too low and likely to burden the carrier."

This conclusion, appellants respectfully submit, is not couched in the language of a reviewing Court, but rather, is the expression that might be expected of an administrative body considering the merits of the controversy before it. The District Court had no authority to consider the merits of that controversy. *Loomis v. Lehigh Valley R. Co.*, 240 U. S. 48-50. Its function was limited by the decisions of this Court to questions of constitutionality, to questions of statutory power, and

to whether the Interstate Commerce Commission had acted reasonably or arbitrarily. *Interstate Commerce Com. v. Illinois C. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Com. v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 110; *Kansas City S. R. Co. v. United States*, 231 U. S. 423, 439-440. Specifically, with respect to the evidence before the Interstate Commerce Commission, the function of the District Court was merely to determine whether or not there was substantial evidence to support the findings upon which the Commission based its order. *Interstate Com. Com. v. Union P. R. Co.*, 222 U. S. 541, 547.

The mere fact that a particular rate or schedule of rates if lower, and even considerably lower than other rates is not of itself conclusive; it does not justify a finding that "on the face of things" the lower rate is too low. Other facts must be taken into consideration, not, to be sure, by the Court, but by the rate regulating body. Circumstances and conditions surrounding the transportation upon all the rates compared must be shown and weighed, and differentiation of rates according to those circumstances and conditions might well justify the view that the lower rate is by no means too low. *Louisville & N. R. Co., v. United States*, 238 U. S. 1, 15-16; *Virginian R. Co. v. United States*, 272 U. S. 658, 666.

But the District Court also commented upon the fact that the Commission expressly found that the log rate was obviously unremunerative. We have already shown, we believe, that the Commission was without evidence to support such a finding. But even if the finding were warranted, it does not necessarily follow that an unremunerative rate casts a burden upon interstate commerce of such consequence as to de-

mand the raising of all of the rates on that commodity within and throughout the entire state without exception. The Commission so found with respect to the relatively lower rates on the intrastate Florida transportation of fertilizer. *Florida Fertilizer case, supra.*

Moreover, it is to be observed that the District Court did not merely proceed to adjudge a finding of the Interstate Commerce Commission that the log rates constituted a burden upon interstate commerce; the Interstate Commerce Commission made no such finding, and as elsewhere shown herein, had before it no evidence upon which such a finding could have been made. What the District Court did was to step again beyond its proper sphere and to find, not that there was substantial evidence showing a burden upon interstate commerce, but that the state rates condemned by the Interstate Commerce Commission would be "likely to burden the carrier." (R. 169.) This was beyond its province, and moreover the Court does not say that *a burden upon interstate commerce did exist.*

To conclude, therefore, on this point, your appellants respectfully submit that in finally determining that the order of the Interstate Commerce Commission could be supported on a state-wide basis, the District Court did not content itself with reviewing the action of the Commission, but usurped the functions of an administrative body, and undertook upon its own understanding of the evidence before that body, to make its own conclusions of fact for the purpose of supporting the order already made. This the District Court was without power to do.

Point IX.

THE DISTRICT COURT SHOULD HAVE GRANTED THE RELIEF PRAYED FOR IN THE BILL AND IN THE SUPPLEMENTAL BILL AND SHOULD HAVE PERMANENTLY ENJOINED THE ORDER OF THE INTERSTATE COMMERCE COMMISSION.

(This is applicable to Assignments of Error I. and XXVII.)

Now, as was the case prior to Transportation Act, 1920, there is embraced in the Interstate Commerce Act, Section 1 (2), the proviso that that Act, "shall not apply—(a) To the transportation of * * * property, or to the receiving, delivering, storage, or handling of property, wholly within one state * * *." This exclusion of intrastate commerce from the federal scheme of regulation is commented upon by this Court in the *Wisconsin case, supra,* page 588, and it was there stated that:—

> "Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete, effective control over interstate commerce, without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso."

As this brief has heretofore shown, logs are a natural resource of the States, and log transportation is essentially short-haul and overwhelmingly intrastate in character. These attributes, we submit, makes

log traffic peculiarly a traffic with respect to which the sovereign rights of the individual states should remain paramount, if that be at all possible. They should not be invaded, as a mere incident of the federal power to regulate interstate commerce, except for excellent cause. No such cause appears in this proceeding.

Consider the sequence of events which led to the condemnation of the Florida intrastate rates on logs by the Interstate Commerce Commission and the substitution by it therefor of much higher rates.

The State of Georgia was the complainant before the Interstate Commerce Commission. It made no attack on the Florida intrastate rates. Nor did the Atlantic Coast Line Railroad Company, the defendant before the Interstate Commerce Commission, attack those rates. They had not been attacked before the Florida Commission. The parties before the Interstate Commerce Commission sought the continued effectiveness of those intrastate rates, and the complainant contended that they should be extended for interstate application.

The Interstate Commerce Commission, by the order here in issue, greatly increased the rates on logs "within and throughout the entire State of Florida, without exception." This it did even though the record before it showed that lower rates on logs were contemporaneously effective on the intrastate traffic of Georgia (the complainant state), of South Carolina, and of North Carolina. (*Ante*, p. 37). As justification for its action greatly increasing the Florida intrastate rates on logs, the Interstate Commerce Commission relied in part upon its own action in fixing rates on road building materials, which rates, how-

ever, it expressly refrained from making applicable to intrastate commerce within Georgia until the Georgia Commission should have first acted with respect thereto. *Rates on Chert, Clay, Sand and Gravel,* 122 I. C. C. 133, 169-170; 160 I. C. C. 309, 313; *ante,* pp. 79-80.

Again, contemporaneously with its action increasing the Florida intrastate rates on logs, the Interstate Commerce Commission considered and declined to increase the Florida intrastate rates on fertilizer materials, although these, like the log rates, were considerably lower than were the interstate rates on the same fertilizer materials. *Florida Fertilizer Case,* 151 I. C. C. 602, *ante,* pp. 48-49.

The amendments written into the Interstate Commerce Act by Transportation Act, 1920, sought to preserve comity between the states, and between the states and the federal government, in the matter of rate rgulation. The Act recognizes that conflicts may arise, and that regulation of state commerce by the federal agency may be necessary as an incident of proper federal regulation of interstate commerce. This Honorable Court, in *Lawrence v. St. Louis-San Francisco Ry. Co., supra,* points all this out, with the admonition that "it is important that the federal power be not exerted unnecessarily, hastily, or harshly."

Your appellants respectfully submit that the action of the Interstate Commerce Commission in greatly increasing the rates on logs, one of the few natural resources of Florida, within and throughout that entire state, without exception, and with no saving clause to preserve the sovereign rights of the State of Florida with respect to such purely intrastate commerce in the future was unnecessary, hasty, and harsh. It afforded no opportunity whatever for the State of Florida to

act for itself. It left no opportunity for the State of Florida to act in the future; change in the Florida intrastate rates on logs is forbidden by the order of the Interstate Commerce Commission, which requires that the rates promulgated in its order shall be established, put in force, *and maintained* within and throughout the entire state of Florida, without exception; change in that order by the Interstate Commerce Commission must be made ere any change in the intrastate rates can be made. (R. 801.)

The Interstate Commerce Commission has general inquisitorial powers. It may proceed on its own motion to an investigation of any matter concerning which complaint may be made to it. When the varying levels in intrastate rates on logs in the southeast came to its attention the Interstate Commerce Commission could have proceeded to an investigation of the entire subject in the manner that the statute contemplates. It could have avoided singling out for federal action the log rates of Florida, against the level of which *no one* complained.

Again, to preserve comity in the matter of rate regulation, the Interstate Commerce Commission might have, and indeed should have, accorded to the sovereign State of Florida as respects log rates, the courtesy accorded by it to the sovereign State of Georgia as respects rates on road building materials. It might, in other words, have afforded to the Florida authorities the opportunity to "harmonize" the Florida intrastate log rates with the interstate log rates just as it afforded to the Georgia authorities the opportunity to harmonize the rates within Georgia on road building materials.

And, again, the Interstate Commerce Commission,

your appellants believe, should have afforded to the intrastate shippers of logs within Florida the same courtesy and consideration which were accorded to the intrastate shippers of fertilizer materials within the state. The Court will observe from the report of the Commission in the *Florida Fertilizer case, supra,* that the state rates there were considerably lower, as is the case with the state log rates, than the interstate rates. But even so, the Interstate Commerce Commission did not reach into the confines of Florida and raise all the rates on fertilizer for intrastate transportation within and throughout that state without exception. It chose instead, to be guided by the evidence there before it, and recognized that increasing the intrastate rates might, indeed, destroy the traffic and thus produce the result which this Court in the *Wisconsin case, supra,* page 591, expressly indicated must be guarded against. There is in the record before the Interstate Commerce Commission in the log case the same kind of evidence as was offered in the *Fertilizer case* to prove that increasing the state rates in the manner in which the Commission did increase them would but destroy the traffic and thus really burden interstate commerce. There was, indeed, no substantial evidence to the contrary, and as shown above, *ante,* pp. 43-44, it is mathematically demontrable that there could be no evidence to the contrary, for inevitably the rates fixed by the Interstate Commerce Commission must destroy the log traffic.

For these reasons, and for the reasons already shown in the argument herein under Points I. to VIII., inclusive, your appellants respectfully submit that the District Court should have granted the relief prayed for in the Bill and in the Supplemental Bill and should

have permanently enjoined the order of the Interstate Commerce Commission.

Respectfully submitted,

HENRY P. ADAIR,
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AUGUST G. GUTHEIM,
H. PLANT OSBORNE,
Solicitors for Appellants.

April 9, 1930.

APPENDIX.

STATUTES RELIED UPON.

The Interstate Commerce Act, (41 Stat. L., 474):

Section 1:

"(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property

and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States, as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions **of this Act except** for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

"(5) All charges made for any service rendered or to be rendered in the transportation of * * * property * * * **shall be just and reasonable, and every unjust and unreasonable charge** for such service or any part thereof is prohibited and declared to be unlawful."

Section 2:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by

any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3:

"(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 13:

"(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization,

or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matter complained of in such manner and by such means as it shall deem proper.

(2) * * * The Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though

it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders of the payment of money.

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15:

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged or collected, by any

common carrier or carriers subject to this Act for the transportation of * * * property * * * as defined in the first section of this Act, * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect, any rate, fare or charge, for such transportation * * * other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be * * *."

Section 15a:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management, and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as

nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust and unreasonable, and to prescribe different rates for different sections of the country."

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided,* That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to

time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier, receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission find are under common control and management and are operated as a single system, shall be computed for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."

The District Court Jurisdiction Act (C. 32, 38 Stat. L., 219):

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce

Court and to amend the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment * * *.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation, or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment, the term "destination' shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operations, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit; *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three

judges, concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the

district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the state.

The Commerce Court Act (C. 309, 36 Stat. L., 539):

"SEC. 1. That a court of the United States is hereby created which shall be known as the Commerce Court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section

twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this Act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

"Sec. 211. All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved."

"Sec. 212. The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court; if in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors

at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided,* that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suit: *Provided, further,* That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor

aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General of the United States therein.

"Sec. 213. Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel and under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

Act of February 13, 1925 (C. 229, 43 Stat. L. 936).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and re-enacted to read as follows:

* * * * *

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * *

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review

of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

Act of January 31, 1928 (C. 14, 45 Stat. L. 54).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That the writ of error in cases civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required; *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Act of April 26, 1928 (C. 440, 45 Stat. L. 466).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled "An Act in reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

"Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."